IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2224 OF 1996
with
SPECIAL CIVIL APPLICATION NO.5483 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ALKA SYNTHETICS LTD

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

DM INVESTMENTS

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Appearance:

1. Special Civil Application No. 2224 of 1996

MR BR SHAH, SR. ADVOCATE with MR RK MISHRA for Petitioner

MR KIRIT RAVAL, SR. ADVOCATE with BH CHHATRAPATI for Respondent No. 1

MR NIRANJAN J BHATT for Respondent No. 2

MR SN SOPARKAR WITH BHARAT T RAO for Respondent No. 3

2. Special Civil Application No.5483 of 1996

MR KAMAL B. TRIVEDI, with Mr Rakesh Gupta with KS JHAVERI for Petitioner

MR SN SHELAT, SR. ADVOCATE WITH BH CHHATRAPATI for Respondent No.1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: /02/1997

ORAL JUDGEMENT

1. The two petitions raise substantively identical questions and have been heard together at the request of counsel for the parties. Hence, I propose to deal with same by a common order.

First about Facts:

FACTS AND PRELIMINARY OBJECTIONS RELATING TO SPECIAL CIVIL APPLICATION NO. 2224 OF 1996

2. This petition has been filed in the circumstances to be stated hereinafter and raises the issue about the authority of Securities and Exchange Board of India (for short, "SEBI") to order impounding and/or confiscation of whole or part of consideration of a completed transaction, which in ordinary circumstances concerned party to transaction is entitled to receive and for whom which is an actionable claim, under the existing provisions of law under which SEBI functions. This issue is similar to one raised in Special Civil Application No.5483 of 1996 M/s D.M.Investments vs. SEBI and Others, which also has been heard along with this petition.

3. The petitioner is a company registered under Indian Companies Act, 1956 and is having its registered office at Ahmedabad. As per the case set out in the petition, in pursuance of notice No. B.20/96 dated 7.2.1996 issued by the Bombay Stock Exchange (hereinafter called, "the Stock Exchange") inviting from the members of the Exchange offers for sale of shares of M/s. Magan Industries Limited (for short, "MIL") because transaction of purchases of shares of MIL, remaining outstanding for want of availability of adequate number of shares with the sellers to fulfil their corresponding selling obligation. In response to the said notice dated 7.2.1996 (Annexure A), the petitioner who was holding shares in MIL offered 50000 shares for sale at auction to the Stock Exchange through its member, respondent No.3 Inderlal Agarwal. The transaction of sale of petitioner's shares at auction was at

Rs.118 per share inclusive of chargeable expenses. After deducting charges the petitioner was to receive consideration of the said shares from the Stock Exchange through the said broker at Rs.116.80ps per share. The price of the shares so offered by the petitioner at auction for sale was recovered by the Stock Exchange respectively from purchasers and short sellers, as per its byelaws and practice of auctioning the Exchange were to recover part of the consideration for such shares from the purchasers, at the rate at which transaction of purchase has been entered by the purchases who were to take delivery of shares, and difference between the auction price and the purchase price so payable by the purchasers was to be recovered from respective short sellers. The amount so recovered by the Stock Exchange becomes payable to the offerer by crediting his account after deducting chargeable expenses The SEBI in its impugned order dated 4.7.1996 has referred to this aspect .

4. The consideration of transaction at auction was received by the Stock Exchange. However, before the amount could be paid to the offerers, the Stock Exchange issued notice on 15.2.1996 stating that as per the directives received from SEBI the payments due to the members on account of acceptance of their MIL shares offered in pursuance of auction Notice No. B.20/96 is to be retained by the clearing house until completion of investigation and further decision in this regard. Petition was originally filed challenging the directives of SEBI referred to in notice dated 15.2.1996 issued by Stock Exchange (Annexure B), for retaining the amount already collected by Stock Exchange from being paid to the members through whom petitioner has offered his shares for sale, thus affecting its claim to that money.

5. In its reply it was submitted by the SEBI that it has prima facie indication that there was artificial manipulation of the price of the scrips of MIL and preliminary investigation indicate that the petitioner has been heavily buying and selling in this scrip in consortium with its other group of companies. In view of this circumstance, the respondent is actively pursuing its investigation which is likely to take some time, it was pleaded that in the interest of investigation, the auction proceeds may not be disbursed to any person till the investigation report is available and the said

directive was only an interim measure.

The petitioner had raised a very fundamental issue whether even in case investigation results in indiction of petitioner, SEBI has a jurisdiction to make a final order for confiscating or depriving the petitioner of consideration which has already become due in respect of transaction about its scrips and which has been received by Stock Exchange from respective parties from whom consideration was to be received, without there being any specific provision of law to that effect.

6. Keeping in view the pleadings and respective contentions on 6.5.1996 it was directed by way of interim relief that SEBI shall complete the investigation in respect of share transactions of MIL latest by 3rd June 1996 (which was extended later on on an application being made in this behalf). Respondent No.1 was also directed to consider whether the petitioner has any role to play in the alleged irregularities in the transaction under investigation. It was also stated in the order that if the petitioner is not involved in the alleged malpractices and irregularities, respondent No.2 shall modify its order pertaining to retention of the amount in question by the Stock Exchange and permit the Stock Exchange to release the proceeds of transaction of shares in question in full or in part in favour of the petitioner as it deems fit, proper and equitable.

7. Thereafter the order dated 4.7.1996 came to be made by the Chairman of respondent NO.1. Regarding the amount it was directed to be retained by the Stock Exchange. Concerning the receipts of the auction, it was ordered ;

"As regards the amounts retained in respect of the auction proceeds, it may be mentioned that according to the normal stock exchange practices whenever a seller is not able to deliver the securities and when the auction is called for, the monies are taken from the Buyer to the extent of the transaction price/standard price and from the Seller to the extent of the difference between the transaction price/standard price and the auction price and given to the offerer who has given the securities in the auction proceedings.

In this case, the securities were taken from the offerers but the auction proceeds were not released to the offerers in view of the SEBI directions as there was alleged price rigging and market manipulation in the trading of the security so that the offerer would not be able to take away undue and ill gotten profits arising out of such manipulations. The investigations carried out have concluded that there was price rigging and market manipulation in the trading of this scrip and therefore the auction price does not reflect the true market value of the scrip. It is also found in investigations that some of the Offerers were directly involved in the manipulation. However, at the same time in the interest of fairness and justice it is to be considered that the securities offered by the offerers have some value and therefore the amounts equal to the standard price of the security for the respective settlement should be released to the offerers as the intention is only to ensure that the offerers should not get undue or ill gotten profits arising out of the rigged/manipulated price.

8. The order also says that while it is necessary to give opportunity to the affected persons in terms of principles of natural justice, it decided to dispense with the formal prior hearing, however left it open to the aggrieved parties to make a written representation within fifteen days on receipt of the intimation of the order from respective Stock Exchange and such representations were to be decided by a committee to be set up by SEBI, which would exclude the members of the investigating team to be on adjudicating committee. Though this order was made on 4.7.96 the same was not communicated to the petitioner or any of the affected parties. However, on the direction of the court a copy of the order was delivered to the counsel for the petitioner by the counsel for the respondent in the court during the course of hearing , and thereafter amendment was sought by the petitioner for challenging the order dated 4.7.1996 as well, on various grounds to be noticed hereafter.

9. However, before proceeding further, learned counsel for respondent No.1 raised preliminary

objections which may be considered at this stage. Firstly, it has been urged that as no part of cause of action has arisen within the State of Gujarat, petition under Article 226 challenging the impugned orders are not maintainable, in the High Court of Gujarat. Clause (2) of Article 226 provides that the power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. Clause (2) of Article 226 was inserted as clause (1A) by the Constitution (Fifteenth Amendment) Act, 1963 and was renumbered as clause (2) by the Constitution (Forty-second Amendment) Act, 1976. The amendment in the Constitution was brought as a consequence of difficulties arising out of decisions rendered prior to such insertion that the writs issued by any High Court do not run beyond the territories in relation to which each High Court exercises jurisdiction. As a result of the insertion of the said provision any government or authority or person became amenable to the jurisdiction of the High Court notwithstanding that the seat of such Government or authority or the residence of such person happened to be beyond the territories in respect of which the High Court exercises its jurisdiction if cause of action for issuing any writ, direction or orders whether wholly or in part has arisen within the territory in respect of which the High Court is exercising its jurisdiction.

10. Though cause of action has not been defined either in the Civil Procedure Code or under the Constitution, the expression cause of action has acquired a well settled meaning. It means bundle of facts which the petitioner must prove, if traversed, to be entitled to a judgement in his favour by the court. In determining the objection of lack of territorial jurisdiction, the court is required to take all the facts pleaded in support of the cause of action into consideration without embarking upon the enquiry into the correctness or otherwise of such facts.The question is to be decided on the basis of facts pleaded in the petition or plaint, the truth or otherwise of the averments made in the petition being immaterial.

11. The principle was enunciated by Lord Watson in Chand Kour vs. Partab Singh ILR (1889) 16 Cal 98 -

> "The cause of action has no relation whatever to the defence which might be set up by the defendant nor it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

12. This principle has been approved by the Supreme Court in Oil and Natural Gas Commission v. Uptal Kumar Basu and others (1994)4 SCC 711, wherein the court said after quoting the aforesaid principle :

> "Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition."

13. If we examine the pleading of the petitioner in this respect, the salient features which may be called bundle of facts of which claim for relief of the petitioner is founded are - (1) that on 7.2.1996 petitioner offered 50000 shares of MIL for sale at auction as per invitation by the Stock Exchange; (2) the price settled for such transaction of auction was at Rs.118 per share of which after deducting expenses consideration at the rate of Rs.116.80ps. became payable to the petitioner. The amount was received from those persons from whom the consideration of such shares was to flow, by the Stock Exchange; (3) the Stock Exchange notified that such amount is ordered to be retained by it by SEBI

and therefore it cannot be paid; (4) the amount was ordered to be retained by SEBI for completion of investigation and further decision in that regard; (5) as a result of completion of investigation order dated 4.7.96 came to be made for release of part of the money retained by the Stock Exchange to the extent referred to in the order and remaining amount was ordered to be impounded; (6) respondent No.1 has no authority to order impounding of money which had become due to the petitioners for various reasons including lack of authority and breach of principles of natural justice, affecting the order founded on the basis of investigation. It is also to be noted that there is no dispute that but for the intervention of SEBI, as a result of investigation petitioner would have been entitled to that sum in ordinary course. It has also been the averment of the petitioner that the summons for attendance of various representatives of the petitioner issued by the investigating officer appointed by respondent No.1 under Section 11(3) of the Securities and Exchange Board of India Act, 1992 (the Act for short) in connection with enquiry instituted by respondent No.1 in the case of buying or selling or dealing with the shares of the company was served upon the petitioner on 2.4.1996 at Ahmedabad. On the basis of said summons on Shri Satish Pancholia, Managing Director of the petitioner at Ahmedabad his statement was recorded at Ahmedabad on 2.4.1996. The documents as demanded by the investigating officer was handed over to him by the petitioner on the same day at Ahmedabad.

14. Though the pleadings in defence of the claim made by the petitioner are not required to be gone into for the purpose of determining the issue of objection about territorial jurisdiction of the Court, it is pertinent to notice that but for the investigation ordered by respondent No.1, and the order made by as a consequence of such investigation, the petitioners claim to the amount recovered by the Stock Exchange as a result of auction transaction in pursuance of notice dated 7.2.1996 is not disputed and the facts about service of summons, recording of statement, and recovery of documents in connection with the said investigation against the petitioner company at Ahmedabad on 2.4.1996 are also not disputed.

15. In these circumstances, the conclusion is irresistible that holding of investigation in the

affairs of buying and selling and dealing with the shares by the petitioner company qua the shares of MIL, is an integral part of the whole cause of action giving rise to the present claim of the petitioner and therefore citus of investigation will obviously be a citus of at least a part of cause of action giving territorial jurisdiction to the court exercising jurisdiction over that citus. On the facts averred by the petitioner, which remain undisputed, lending additional support to the pleadings about investigation, if part of investigation at least has been held at Ahmedabad and the investigation being the foundation of the impugned order and such investigation in the case of petitioner for bringing into existence the impugned order has taken place at Ahmedabad, which undisputedly and undeniably is within the territory over which this court exercises jurisdiction. This alone is sufficient to hold that the High Court of Gujarat had territorial jurisdiction to examine the issue and issue appropriate directions in respect of the impugned orders which have been founded on an investigation part of which have taken place at Ahmedabad within its territorial jurisdiction.

16. It has also been urged that though citus of service of order has also determinative relevance for deciding question of jurisdiction of the court, and the principle has not been disputed by the respondents, but since the order under challenge has been served on the petitioners at Ahmedabad only during these proceedings in court by handing over the order to the counsel for the petitioner, it cannot be used as ground for furnishing cause of action at Ahmedabad.

17. On a close scrutiny, I find no substance in this submission. The order dated 4.7.1996 in no unmistakable terms state that aggrieved persons may be given opportunity of hearing. For this purpose, the order was required to be served on affected parties to enable the aggrieved person to file objections. Instead of SEBI effecting service itself, it directed concerned Stock Exchange to intimate the affected parties. Stock Exchange had the necessary details about the persons whose shares were offered at auction and were thus affected by the order and were entitled to receive intimation. It cannot be said that intimation was required to be given to aggrieved parties by calling them to Stock Exchange only. It may further be noticed that in

its written submission also this much has been stated on behalf of SEBI that the order was served on the Bombay Stock Exchange for suitable intimation to its members and other parties. That is clear indication that the impugned order was required to be served not only on members of Stock Exchange but also on other affected parties. Undoubtedly the petitioner is one of the affected parties, which fact is not seriously disputed nor could it be. Even otherwise, without this direction, if the order in terms affected a person's right and was meant to furnish a post decisional hearing to affected parties, without requiring serving of the copy of order, it would have been meaningless. It is not the case of the respondent that the order was not required to be served on the petitioner at all. What is argued is that since SEBI itself was not to serve the order but it was to be served by Stock Exchange its furnishing copy in the court will not furnish cause of action.

18. Once it is held that, as it must be, that the order was required to be served on petitioner, the fact whether author of the order itself effects the service or someone else is directed to discharge the ministerial duty of service will not affect the position. What is required to be seen is where the order was required to be served on person whose rights are affected by it. If the order was required to be served within the territory, where this court exercises jurisdiction, it will not alter the situation if the order has been served in court during proceedings at Ahmedabad. Position may be otherwise, if but for court proceedings the order on the affected party would not be served at a place within the court's territorial jurisdiction.

19. In the present case, it is not disputed that petitioner's registered office is at Ahmedabad within the territorial jurisdiction of this Court. The notice of investigation were served at Ahmedabad. Statements in pursuance of that were recorded at Ahmedabad. As a result of said investigation impugned order came into existence affecting petitioner will also be required to be served at Ahmedabad, and in fact the same has been served at Ahmedabad.

20. In this connection, learned counsel for the respondent placed reliance on decision of Supreme Court in State of Rajasthan vs. Swaika Proprietors

reported in AIR 1985 SC 1289. A close reading of the decision makes it clear that whether in a given set of circumstances service of notice is a part of cause of action or not is not to be determined on any absolute rule in abstract but depends on entirety of facts, nature of order, nature of right affected etc. The court had laid down the ratio that:

> "The answer to question whether service of notice is an integral part of the cause, of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of impugned order giving rise to cause of action."

21. Applying the above test to the facts of the case before Supreme Court, which had arisen in the matter of land acquisition proceedings under Rajasthan Urban Improvement Trust Act the court found that notice under section 52(2) of the said Act was published in Rajasthan proposing the acquisition of land situated in Rajasthan at Jaipur, service of notice inviting objection against proposed acquisition which was to take place in Rajasthan was served on the petitioner in Calcutta, where he was residing. Thereafter, all proceedings took place in Rajasthan, viz., enquiry and hearing. Thereafter notification under Section 52(1) was published in Rajasthan which resulted in vesting of property in State of Rajasthan. The petitioner challenged the notification under Section 52(1) of the Act. In those circumstances, where citus of property affected, enquiry into objections about it, its rejection, and final order vesting of property in Rajasthan had all taken place in Rajasthan. In these circumstances, obviously, mere service of notice of proposal to acquire property under Section 52(2) was held to be not part of cause of action at all.

22. Here, we are not concerned with a case where mere notice of proposed auction is served at one place, but proceedings itself has been completed at other place including the situation of property affected was situated in the other place. Here we are concerned about a case which is not of service of mere notice of enquiry at Ahmedabad, but where order itself has been served at Ahmedabad. Swaika Property's case was not a case of service of final order. Nor it was a case where final order was

required to be served, nor was it a case of quasi judicial order, which unlike a statutory order of acquiring land does not depend on its efficacy on service. The court found as a matter of law that order under Section 52(1) of the Act became effective as soon as it was published inasmuch as the property affected by it vests in State on its publication. A judicial order pronounced in open court becomes effective as soon as it is pronounced. Where the order made by quasi judicial authority, and is not made in the presence of parties ordinarily becomes effective, when served on affected parties.

23. Moreover in the present case, the order has been made as a result of enquiry. It had been made without hearing of affected parties. It envisaged post decisional hearing to affected parties. Therefore service of the order, in the very nature of things, was an essential part of whole gamut. To save it from being void for want of fair procedure, in fact, the order itself made it requisite for its effectiveness, that it be served on all members of Stock Exchange and other affected parties. Therefore, in the circumstances of the present case service of order, as distinguished from service of notice prior to enquiry as was the case before, the Supreme Court in Swaika Property's case is an integral part of cause of action. Rather service of it itself furnished cause of action to seek remedy against it. As discussed, the order was required to be served at Ahmedabad and was in fact served at Ahmedabad, the decision in Swaika's case does not further the case of objections.

24 In Modern Food Industries (India) Ltd., Ahmedabad & Ors. v. M.D. Juvekar reported in (1988(1)) 29(1) GLR 481 a Division Bench of this Court speaking through A.M. Ahmadi,J, as he then was, in a case where the order of termination was made at New Delhi but was served on the affected party at Ahmedabad where he was at the relevant point of time on leave and the question as to territorial jurisdiction was raised said :

"Be that as it may, the fact remains that the order of termination of service, though passed at New Delhi, was communicated to the respondent-employee at Ahmedabad since he was at the relevant time on leave. Whether it was for the convenience of the

> respondent-employee or for any other reason is not material, what is material is the fact that it was communicated to him at Ahmedabad. In our view, therefore the decision on which Mr. Bhatt places reliance cannot come to the rescue of the appellants since it in terms states that the cause of action would arise not only at the place where the order of termination of service was made but also at the place where its consequences fell on the employee. We cannot subscribe to the submission that the consequence of the termination order fell on the respondent-employee at Calcutta, the fact that it was communicated about had notwithstanding merely because the employee was posted at Calcutta Unit. It may be that on the receipt of the order by the Calcutta Unit, a part of the cause of action can be said to have arisen at Calcutta also but that cannot nullify the fact that the consequences of the order fell on the respondent-employee when he was informed about the same at Ahmedabad. We are therefore, of the opinion that the aforesaid decision in fact is an authority for the proposition that a part of the cause of action arose at the place where the order of termination of service was communicated to the concerned employee."

25. The petitioner company has its registered office at Ahmedabad. Citus of its movable property is at Ahmedabad. By impugned order the right of the petitioner company arising out of transaction of that movable property are affected. Thus applying the test in Modern Food Industries case it can well be said that consequence of the impugned order fell on the petitioner at Ahmedabad where the order was served, where the citus of petitioner's property in share was situated. The principle applicable to determine the jurisdiction of court in a suit for recovery of movable property cannot be applicable, obviously because this lis is not for recovery of movable property. The petition is to protect petitioners' right in movable property which has been impaired not by a person possessed of such property but by an act of statutory authority in purported exercise of its powers under the Act. The citus where such right is affected or where the effect of such order to affect the right becomes the

relevant consideration.

26. In Damomal Kausomal Raisinghani v. Union of India and others reported in AIR 1967 Bombay 355, the issue was raised about territorial jurisdiction of Bombay High Court, in respect of a petition challenging the order made under the Displaced Persons (Claims) Supplementary Act verifying the claim of displaced persons at Delhi, Preliminary objection as to the jurisdiction of the Bombay High Court to entertain the petition was negatived by Their Lordships of Bombay High Court. The Court held :

> "The question that arises is whether the cause of action for the exercise of the power invoked by the petitioner arose wholly or in part within the territories in relation to which this Court exercises jurisdiction. The petitioner, as it appears, was a resident of Ullasnagar, a place situated in the District of Thana of Maharashtra State. The impugned order itself shows that the case was heard in Bombay. It is indeed true that the order on the face of it does not show the place where it was made. Even assuming that this order was made by the third respondent in New Delhi, there can hardly be any doubt that the effect of this order fell on the petitioner at Ullasnagar where he resides."

This decision had been followed by this Court in Modern Food Industries Limited (supra) referred to above.

27 In L.V. Veeri Chettiar and Anr. v. Sales Tax Officer, Bombay reported in AIR 1971 Madras 155, Their Lordships considered the impact of notice issued by authority under fiscal statutes for the purpose of considering the cause of action giving territorial jurisdiction to a Court, while authority issuing notice is situated outside the jurisdiction of the Court. It held:

> "The person primarily affected by the respondent issuing the notices from time to time to the petitioners and calling upon them to produce the accounts of their business carried on in the State of Tamil Nadu and again by proposing to assess them

> to the best of his judgement on the assumption of certain jurisdictional facts, is the addressee of such notice and such affection relates to the bundle of facts in the totality of the lis or proceeding concerned, and such impact necessarily gives rise to a cause of action, though it may be in part. It is established that in fiscal laws a proposal to assess forms part and parcel of the machinery of assessment and thus understood, the service of notice to assess and calling upon the petitioner to explain has given rise to a cause of action as is popularly and legally understood and the machinery of assessment has been set in motion and the impact of that motion is felt by the petitioners within the territorial limits of this State. We have therefore no hesitation in holding that a part of the cause of action has arisen in the State of Tamil Nadu."

28. This decision gives a clear indication that wherever issuance of a notice is necessary part of setting a machinery in motion for the purpose of affecting the rights of the person against whom the machinery is to be mobilized and the service of the ultimate order affecting the rights of the person concerned, forms part of cause of action, in relation to a dispute challenging the final order affecting the rights affected by that order. Mere issuance of a notice to a person concerned may not be a necessary part of cause of action but where issuance of such notice is a pre condition for setting the machinery in motion and not the conditions subsequent for the purpose of furthering the cause which has already been set in motion, the service of notice itself becomes part of cause of action. It has also been noticed that the place ultimately where the order is served affecting the rights of the person affected, whether such service be for the convenience of the authority or for some other reason furnishes as a ground for the courts within whose territorial jurisdiction such place is situated, to exercise jurisdiction to entertain such disputes.

29. The above decisions fortify the conclusions to which I have reached that the place where the order is served on the person affected affecting his rights at that place is a part of cause of action,

and gives territorial jurisdiction to the courts within whose territory the place at which service of the order has been effected affecting the rights of the person concerned is situated or to say the court within whose territorial jurisdiction lies citus of right which is affected by the impugned order and that right is actually affected by service of impugned order within that territory has the jurisdiction to entertain challenge as to the validity of such orders.

30. These conditions demonstratively exist in the present case.

31. Petitioner held some shares in MIL, which are movable property. Right to recover the amount arose out of transaction of sale of 50,000 shares is the right in the nature of actionable claim vesting in the petitioner, which again is a movable property at Ahmedabad. It is undisputed fact that before that right can be affected petitioner was required to be served with notice whether at the time of initiating enquiry or before making an order of impounding such consideration received by the Stock Exchange as a result of the conclusion of the transaction and in pursuance of that notice enquiry so far as the petitioner was concerned, as an accused as distinct from merely as a witness, was conducted at Ahmedabad. On completion of the enquiry and on the basis of conclusions reached in that enquiry before taking further action of impounding the fair procedure required that person affected must be given a hearing was accepted by the authority making the order himself, though he thought that it was in his discretion to dispense with the hearing at that stage and to fill in the lacunae by proposing post-decisional hearing by directing the Stock Exchange to inform the affected parties about the order inviting them to file objections, if any, to be decided by a committee to be appointed for that purpose. This clearly indicated the rights of such persons to notice before making any effective order has to be accepted. Thus service of the order itself furnished part cause of action for raising objections against the impugned order. The fact that the petitioner instead of availing of the opportunity of post-decisional hearing before the Committee has chosen to challenge the order by invoking extraordinary jurisdiction of this court does not detract from the fact that order itself

envisaged service of the order to furnish a cause of action for challenging the same.

32. In this connection the plea that if the petitioner were to file a suit for recovery of the claim, he might have to file a suit at Bombay has no bearing on the question of jurisdiction in the present case. It has to be borne in mind that present is a case which concerns relief about impairing of the right of the petitioner in movable property distinct from a suit for the recovery of money simpliciter.

33. Hence where suit for recovery of suit against his would lie cannot ipso facto govern the question of jurisdiction about claim where right to such recovery has itself been affected, not by debtor but by an act of statutory function. In the latter case what furnishes ground for impairing such right forms part of cause of action.

34. Learned counsel for the respondent in support of their preliminary objections have relied on a decision of the Supreme Court in Oil and Natural Gas Commission v. Utpal Kumar Basu and Others reported in JT 1994(5) SC 1.

35. The court had laid down the ratio as to what should be the determinative in consideration of the question determining the territorial jurisdiction of High Court under Article 226. The Court opined:

> "It is well settled that the expression `cause of action' means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgement in his favour by the Court;

It further observed:

> "In determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. .....To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition."

36. This ratio is not a departure from the principles discussed above. On the facts of the case at hand, the Supreme Court found that merely because the petitioner has read the advertisement at Calcutta and submitted offers from Calcutta and made representations from Calcutta would not constitute facts forming an integral part of cause of action. So also the mere fact that it sent fax message from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of cause of action. The controversy related to invitation for tenders for setting up a kerosene recovery processing unit at Hazira complex in Gujarat by the ONGC. No invitation to the petitioner in person was issued which could be termed as service of notice addressed to the petitioner at his place of business. Obviously, only an advertisement inviting tenders from public at large by the ONGC emanated from the office of ONGC. The question of service of personal notice for initiating enquiry or notice necessary for conduct of an enquiry against the person affected and a general public notice cannot be treated at par. A public notice in the nature of general information cannot be equated with the service of notice to a specific person necessary for the conduct of an enquiry to follow, which furnishes foundation for making of the final order nor it could be equated with the service of the final order which affects the person's rights effectively at the place of service, as is the case in the present case, as discussed above. Therefore, for the reasons discussed above, the case is clearly distinguishable on facts.

37. I therefore find no substance in the preliminary objection about lack of territorial jurisdiction and the same is hereby overruled.

38. Another contention is that the petitioner has no privy of contract with respondent No.1 SEBI. He has dealt in Stock Exchange only through respondent No.3, a member of Stock Exchange. All dealings having been done through respondent No.3, and respondent No.3 having accepted the position that all disputes relating to dealings at Bombay Stock Exchange are subject to Bombay Courts, the petition can avail of remedy only at Bombay and not anywhere else. Argument look felicitious but is fallacious. The petition is not to enforce the agreements. What is the subject matter of the petition? According to petitioner transaction of

50,000/- shares of Magan Industries offered by him for sale at auction has culminated in certain right accruing to him in the form of a right to actionable claim against one or more persons who can be said to be privy to contract. His such right, existence of which is not in dispute, to enforce his claim against those who are party to contract has been affected by act of SEBI, by order which it purports to have passed in exercise of its statutory powers under SEBI Act. The petitioner seeks to challenge that order which has affected his rights against persons who are privy to contracts. I am unable to appreciate to determine the locale of jurisdiction of Court, how the question of privity of contract, and agreement to submit to jurisdiction of one territorial court to enforce the contractual claim between the Stock Exchange and its members become relevant. The challenge to impugned orders does not arise between any persons who are privy to that contract. But challenge is to an act of statutory authority whose action has allegedly affected rights of the petitioner qua those persons against whom he can enforce such rights, but for the intervention by the said statutory functionary. The order is not outcome of any act of party who is privy to contract. The fact that respondent No.3 also could have challenged the impugned order and he could have done only at Bombay also is of little assistance. The fact that other affected person also has a right to challenge the order but at a different place cannot take away the right of the petitioner, which is his independent right, for challenging the very order at a place, where also the court has otherwise jurisdiction. The case has to be examined whether the courts at Ahmedabad had jurisdiction to try the lis, from the point of view of action having affected rights of the petitioner and bundle of facts furnishing cause of action to the petitioner and none else. Also it is of little consequence that respondent No.3 has not joined the petition as petitioner. Learned counsel for the respondent has been unable to support in any manner that joining of respondent No.3 in any way affect the question of locus of the petitioner, jurisdiction of the court or the maintainability of petition for not being arranged as petitioner. It is the freedom of any person to choose whether to join or not to join a person as claimant, plaintiff or suitor. If he is necessary party, it is only required that he is to be joined as party, whether as suitor or respondent, depends upon his freedom.

39. The next preliminary objection which has been raised by learned counsel for the respondents is that the impugned order dated 4.7.1996 be treated only as an interim order until decision is taken on the representations made before it by respondent No.1, the petition is premature and must not be entertained. Having carefully read the impugned order, I am unable to sustain the objection. Firstly, the order read as a whole leaves no room of doubt that the authority has reached its conclusion finally about the course of action to be adopted by it of impounding that part of auction proceeds received by Stock Exchange on completion of transaction in question could be used as per its (SEBI's) directions which represents the difference between the price which it considers to be the fair market price to be paid to the petitioner for the shares offered by him at auction for sale, to complete the pending transaction and the actual price received by the Stock Exchange by concluding the pending transactions by delivering those shares to the purchasers on recovering the purchase price from the purchasers at the transaction rate and difference from the short sellers, which according to respondent No.1 represents profits earned by petitioners but tainted with illegality. This conclusion is not revisable or reviewable by the authority, nor decision as a whole is to be finalised after hearing the other side. What clearly been stated in the order is that according to the authority, no hearing is really required to be given but since it is required of justice and fairplay, that though hearing should be afforded to affected parties as a fundamental principle of nature justice, no formal hearing be given at this stage before making the order of impounding, the auction proceeds to the extent it is not to be paid to the petitioners or others like him but a post-decisional hearing may be given to those who may opt to make representations in that regard within fifteen days and their cases alone may be examined by the committee set up for the purpose of examining those representations. This is clear from the following directions:

> "In view of the above discussion, formal prior hearing has been dispensed with at this stage. It may however, be mentioned that many of these affected persons had the opportunity of placing their cases to the

> investigating team which had taken those into account while arriving at its conclusions it may also be mentioned that some of them had not even availed of this opportunity. In view of this, perhaps no further hearing was needed specially when the decision is of a regulatory and remedial nature. Still to give them further opportunity, I decide that any person who is affected by impounding of auction proceeds to the extent of difference between the auction price and standard rate and the close out proceeds representing the difference between the close out price and the standard rate may be given an opportunity to be heard. Regarding of hearing by SEBI, the intimation will be given by the Stock Exchange, Mumbai, in the manner usually followed by the Exchange. The aggrieved persons may submit a written representation within 15 days. SEBI on receipt of such intimation by the exchange."

40. From the aforesaid, it is abundantly clear that there is no way in which the impugned order can be treated as interim order, It expresses itself, in no uncertain terms the authority has reached final conclusion about its decision to impound the part of consideration received by Stock Exchange by dispensing with the requirement of a hearing of the affected parties and has after making final order left it open for those who are aggrieved to seek post-decisional hearing. Thus, post-decisional hearing has been offered to those who are desirous of availing the opportunity of post-decisional hearing for review of their cases but is not an interim order as such subject to final decision after hearing all concerned. It may be noticed that so far as SEBI, it has not even thought it fit to inform about this order to affected parties when it admits of the fact that members as well as other persons are affected, nor even discloses who are the affected parties but left it to Stock Exchange to find out and inform such parties about the order.

41. Secondly, the contention which has been raised and requires consideration in the present petition and the other petition which has been heard along with it is whether SEBI had authority of law to make such order which results in depriving a person of his property. If it is not authorised by

law, the authority cannot have such power to bring this result by way of interim order as well. Without going into the merits of the contention at this stage, suffice it to say that the contention which goes to the root of the matter about authority to make any order of impounding at all whether by way of interim order or final order and concerns the very existence of jurisdiction with the SEBI to deal with the proceeds which have reached Stock Exchange as a result of concluded transaction and has become actionable claim of respective parties, cannot be shut out solely on the ground of the order being interim in character. It is not the case of respondents either that decision about authority of SEBI to pass such order is subject matter of post decisional hearing and revisable on reaching other conclusion after hearing.

42. Alternatively it has been urged by the respondents that if the order dated 4.7.1996 is to be treated as a final order it can be made subject matter of further appeal and therefore this court ought not to entertain this petition at this stage by permitting the petitioner to bypass the alternative remedy.

43. Having carefully considered this objection, in the facts and circumstances of the present case, also does not commend itself.

44. Law is trite that ordinarily the courts do not invoke extraordinary jurisdiction when a petitioner has an equally efficacious alternative remedy available to him to ventilate his grievance and seek remedy, but does not bar the jurisdiction of the court to entertain such petitions in appropriate cases. It is a matter which vests ultimately with the discretion of the court which is to be exercised, keeping in view the facts and circumstances of each case. The two well known exceptions which have been well recognised by the courts in not insisting upon availing of alternative remedies before invoking extraordinary jurisdiction under Article 226 are firstly where the challenge is founded on complete lack of jurisdiction in the office or authority to take the action impugned and secondly challenge where the order prejudicial to the petitioner has been passed in violation of the principles of natural justice and could therefore be treated as void or non-est. It may be made clear that these two are not the only exceptions to the

exercise of discretion by the court in favour of entertaining petition under Article 226, notwithstanding availability of alternative remedy but only for the purpose of emphasising that in the aforesaid two circumstances, ordinarily court do not insist on availing of alternative remedy before entertaining the petition under Article 226.

45. In this connection enunciation of principle by the Apex Court in A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and another in AIR 1961 SC 1506 may be usefully referred to. The Court said:

> "The rule that the party who applies for the issue of a high prerogative writ should, before he approaches the court, have exhausted other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which courts have laid down for the exercise of their discretion.
>
> The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Article 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, courts should not entertain petitions under Article 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of

> individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus preeminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

46. The principle since has not been departed from and the authorities need not be multiplied.

47. In the present case as has been noticed challenge to the impugned order is founded on lack of inherent jurisdiction in the form of lack of authority of law for making such order, and orders having been made in breach of principles of natural justice have been made ground of attack. If either of the contention is sustained it would render the orders impugned void or non est and the case comes under two propositions generally accepted as normal exceptions to the general rule against entertaining the petitions under Article 226 in the face of availability of alternative remedies.

48. Apart from the fact that the present case fall within the ordinary exception to the rule against entertaining petitions before exhausting alternative remedies, all the parties have addressed in detail on merit of the issues raised.

49. In the like circumstances in L.Hirday Narain v. Income-Tax Officer, Bareilly AIR 1971 SC 33, it was expressed by the Supreme Court that where the petitioner files writ petition instead of availing of statutory remedy and the High Court entertains petitions and gives hearing on merits, petition should not ordinarily thereafter be rejected on the ground of availability of alternative remedy.

50. Moreover this petition has been heard along with Special Civil Application No. 5483 of 1996 with consent of counsel for parties appearing in both the petitions and have argued at length on the common question of law having substantial importance. In the other petition, the impugned order passed by SEBI has been challenged before the appellate authority, and the appellate authority has sustained the authority of respondent No.1 SEBI to impound proceeds of a transaction recovered by the Stock Exchange whether as a result of having

recourse to auction or on closing up of transactions as a whole or in part on the ground of not permitting the holders of security, excess profits which tainted with illegality or are result of abnormal market conditions in the view of SEBI. Thus apart from the fact that ordinarily after matter has been argued fully on merit, it is not desirable to throw out the petition solely on the ground of availability of alternative remedy, insisting upon the present petitioner to avail of alternative remedy, before the appellate authority whose views are already known will be a futile exercise.

51. In my opinion, therefore in the circumstances of the present case, it is not a case, in which discretion ought to be exercised in favour of the objectors. Therefore this preliminary objection is also overruled.

52. It was faintly urged in both the cases that the impugned orders of retaining the amount of difference between purchase price and the market price recovered from the short sellers on closing up of the transactions to be invested in Investors Protection Fund which may be used at the direction of SEBI in future affects the Members of the Stock Exchange inasmuch as the Stock Exchange becomes directly responsible for making such payments recovered by it on closing up of the transactions or settle the transactions by auction only to the respective members. The petitioners being not members of Stock Exchange have no locus standi to challenge the impugned orders, they being not affected by them. However, it was not disputed that the order does affect the rights of the respective petitioners to recover the amount which otherwise would have become due to them on settlement of the transactions in the matter stated above from their respective brokers. It is also not disputed that but for the orders of SEBI, respective amounts were actionable claim to which the petitioners were entitled to recover from respective agents and amounted to their property. In view of this premise, it cannot be argued that the impugned orders does not affect the petitioners right. If that be so, the locus-standi of the petitioners to challenge the impugned orders cannot be affected merely on the ground that they are not members of the Stock Exchange. It is not the case of either of the counsel for the respondent Board that the rights

of the petitioner to lay claim to which they are otherwise entitled under the terms of contract respectively, is not affected by the impugned orders. This preliminary objection, therefore, also is over ruled.

FACTS AND PRELIMINARY OBJECTIONS RELATING TO SPECIAL CIVIL APPLICATION NO.5483/1996

53. The petitioner is a registered partnership firm having its place of business at Revdi Bazar, Ahmedabad. In November 1994, a company called M/s. Rupangi Impex Limited (RIL) came out with a public issue of 1537500 equity shares of Rs.10/- each at a premium of Rs.5/- per share. The issue was oversubscribed by sixty times as on the closing date of subscription, i.e., 1011.1994. On 3.12.1994, RIL started allotment of shares. The prevailing market price of the shares of RIL on 12.12.1994 at Ahmedabad Stock Exchange was Rs.90/-; on 19.12.1994, at Bombay Stock Exchange it was Rs.101/25; and on 11.10.1995 at National Stock Exchange was Rs.345/Between 18.10.1994 to 24.10.1995, the petitioner with the help of M/s. Lloyds Finance Limited and with the help of others purchased in all 94800 equity shares of the RIL and during the same period he sold 32900 shares of the RIL through Lloyds Brokerage Ltd. As a net result of these transactions petitioner was to receive delivery in all of 61900 shares of RIL through Lloyds Brokerage Limited at an overall price of Rs.471.06. Because of the failure of sellers in honouring their commitment about the delivery of shares, petitioner received only 5200 shares resulting into transactions for purchase for remaining 56700 shares remain outstanding, for which petitioner was to pay consideration of Rs.2,67,09,102/-. On 25.10.1995, that is to say after the date when petitioner had already entered into transactions of purchases and sales SEBI (Prohibition of Fradulent and Unfair Trade Practice relating to Security Markets) Regulations 1995 (hereinafter called the Regulations of 1995) were promulgated. On 30.10.1995, Chairman of the Board directed that an investigation about buying and selling of the RIL shares is to take place. It also directed that no notices to persons to be investigated is to be given. On the same day, trading in the shares of RIL were suspended until

further order. The area of investigation under the order dated 30.10.1995 was stated to be :

"a. whether there are any circumstance which would render any person guilty of having contravened any of the regulations of the SEBI (Prohibition of Fradulent Unfair Trade Practices relating to Securities Markets) Regulations, 1995;

b. whether any provisions of the SEBI (Insider Trading) Regulations, 1992 have been violated by any person who is an insider or any person who is deemed to be an insider or connected person; and

c. whether any person who is a stock broker is guilty of having contravened the provisions of the Securities and Exchange Board of India Act, 1992 (`the SEBI Act') or the SEBI (Stock Brokers and Sub-Brokers) Regulations framed thereunder"

54. The order also permitted the completion of outstanding transaction as per Stock Exchange bye laws.

55. The order of the Executive Director of the SEBI issuing directions to the Stock Exchange about the standing transaction, to the extent relevant for the present purposes is as below:

"Such shortage should be auctioned as per usual procedure in your Stock Exchange. However, it has been decided that the auction price shall not be allowed to exceed the last recorded highest price on the Exchange. If the auctions do not succeed with such a ceiling, the outstanding transactions (undelivered) should be closed out at the last highest price. While the difference between the transaction price and the highest price would be collected from the selling brokers, the same should be held by the Stock Exchanges in the separate account and should not be passed on to the buyers till the SEBI investigation is

completed and suitable instructions are given to the Exchanges in this regard".

56. In pursuance of this directives on 3.11.1995 auction was conducted by the National Stock Exchange (NSE). However, it appears that as only meagre number of about 800 shares were offered at auction, the NSE decided to close the outstanding transactions at the price of Rs.565/- per share recorded as on 24.10.1995 and recovered the difference between the transaction price and the closing up price from the short sellers. By order dated 25.1.1996 issued by the Executive Director of the Board that monies collected in adherence of circular dated 30.10.1995 be transferred to investor protection fund of the concerned Stock Exchange. It also recorded that that the investigation has been completed, necessary action is being taken against the persons involved in the price manipulation under Section 11B and 24 of the Act for violation of the Regulations of 1995, and the trading in RIL was allowed to continue from January 29, 1996. The petitioner was not named as a person responsible for alleged manipulated market condition. This order was made without affording an opportunity of hearing to the petitioner and resulted in forfeiting his claim to get the difference price collected by the Stock Exchange as a result of closing up of a transaction at Rs.565/-.

57. The petitioner appealed before the Central Government who by its order dated 22.5.1996 (Annexure A) were rejected. The appellate authority did not decide the question raised by the petitioner that since Regulations 1995 promulgated and came into force after the close of trading period, during which the transactions aforesaid were conducted and therefore had no application to these transactions on the ground that since the impugned order of transferring the difference price in the investors protection fund is not punitive in character, it is not necessary to be decided. For the same reason it also held that the fact that the petitioners were not granted an opportunity of hearing cannot negate the impugned order because the appellants had not suffered any substantial injury because in the opinion of the appellate authority:

While in the normal course the purpose of investment is to make financial gains, when the conditions prevalent are abnormal the

> denial of windfall profits can hardly be described as a denial of a right, because such gains can only be made at the expense of another. It is SEBI's obligation to ensure that its dispensations are equitable between the various parties on the market and that the market conditions are such that investor confidence is retained.

58. Regarding the transfer of difference of transaction price and the price at which the closing up was ordered, it accepted the SEBI plea that:

> "the transfer to the investigation protection fund was not punitive vis-a-vis the purchaser of shares, but was merely a device for the placement of the funds representing the difference between, the squaring up price and the purchase price in appropriate custody, for the benefit of investors as a class."

59. It also opined that in the view of the SEBI the placement of the funds generated from the squaring up process in the case of M/s. Rupangi Impex was equitable and served the broader good of investors as a class. It also held that Stock Exchange was justified in denying the benefit of such abnormal profits based on manipulation to the buyers and this act did not result in any infringement of rights. No hearing was possible in a case of this type, specially as the buyers in any case did not lose in the process. It also ignored the procedural irregularities of not affording an opportunity of hearing as a minor procedure infirmity and affecting the substratum of the order, and finally relying on the order to be equitable and appropriate dismissed the appeal on 22nd May, 1996.

60. These two orders, namely, order dated 25.1.1996 made by Executive Director of the SEBI and the appellate order dated 22.5.1996 affirming that order have been challenged by the petitioner on various grounds to be noticed hereafter.

61. To complete the narration of facts it may be noticed that the petitioner has been contending that while SEBI directed per its order dated 30.10.1995 to conduct the auction or close out the transaction at the last highest price, the Stock Exchange has violated these directives by closing out the

transactions at Rs.565/-, the price prevailing on 24.10.1995 instead of at Rs.669/-, the highest price prevailing before the date of closing out. Suffice it to say that so far as this contention of the petitioner was concerned, another investor has on earlier occasion come before this court challenging the fixation of the price at which squaring up has taken place by way of Special Civil Application No 9450 of 1995 which was rejected by order of this Court dated 22.1.1996. Moreover, that act of violating the SEBI direction is attributed to National Stock Exchange which is not a party before us in this Special Civil Application.

62. In its reply the facts about the issuance of direction of SEBI on 30.10.1995, the transactions having been ultimately settled by way of closing out at the price referred to above, and collection of the difference in transaction price and the closing up price from the short sellers by the Stock Exchange, the passing of order of transferring the same amount to the investors protection fund and absence of affording an opportunity of hearing to the petitioners have not been disputed. It has also been specifically pleaded that there is no element of punishment involved in the directions of the Board, the directions only deprive the petitioners of the wind fall profits arising out of manipulated market and is not a measure of penalty at all. It was also pleaded that there is no breach of Article 300A of the Constitution of India, as the directions do not involve acquisition of the property and there is no breach of Article 20 also. It was stated that the provisions of the Act are comprehensive enough to enable the Board to issue directions which deny the advantage of artificial and rigged prices to anyone. This was in reply to the contention raised in the petition and the relief claimed by the petitioner:

> "to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari, or any other appropriate writ, order or direction, quashing and setting aside the impugned order dated 22nd May 1996 (Annexure A hereto) passed by the respondent No.2 herein, as well as the impugned order dated 25th January 1996 (Annexure A hereto) passed by the Executive Director of SEBI, as being illegal, arbitrary, without authority

of law and violative of provisions of Articles 14, 19(1)(g) and 300A of the Constitution of India"

63. Before proceeding to consider the petition on merit, preliminary objections raised by the respondents may be considered. In first place, respondents have urged that no part of cause of action having been arising within the State of Gujarat this court does not have territorial jurisdiction to entertain the petition. During the course of hearing the petitioners were granted an opportunity to place facts if not already on record to support its plea that the dispute can be entertained by this Court by showing that cause of action or part of cause of action has arisen within its territorial jurisdiction. It has come on record firstly that the impugned order dated 22nd May 1996 which affected the rights of the petitioners was served upon the petitioner at Ahmedabad. Thus petitioners rights governed by the impugned order were directly affected at Ahmedabad as its effect fell on the petitioners at Ahmedabad and secondly that in view of the increased volume of activities of members of National Stock Exchange of India Limited, in view of its nation wide operations has with the permission of SEBI linked to offices of its members at various cities including Ahmedabad whereby the members have been provided full-fledged trading facilities through National Stock Exchange terminals installed in the offices of the respective members situated in various cities including the cities of Ahmedabad, Calcutta, Delhi Madras etc. It was under the said set up the petitioner placed his orders for purchase of share of RIL with Lloyds Brokerage Limited, Ahmedabad, a member of NSE at Ahmedabad only and it was in furtherance of the said orders of the petitioner that the said member of National Stock Exchange through its National Stock Exchange Terminal at Ahmedabad entered into a contract for purchase of 94800 equity shares on behalf of the petitioner against the payment made by the petitioner at Ahmedabad for the said equity shares. Respondents have not thought it fit to deny these averments in the rejoinder affidavit of B.A.Gandhi which was furnished with the permission of the Court, by any counter. In view of the aforesaid undisputed facts, and for the reasons already discussed, while considering the like objections hereinabove in cognate matter Special Civil Application No. 2224 of 1996 which is being

heard and decided along with this petition, this objection is overruled.

64. The second preliminary objection relates to non joining of National Stock Exchange as a party particularly in view of the prayer (B) for issuing directions to the Stock Exchange for paying the differential amount to the petitioners with interest which has been directed to be transferred to the investors protection fund.

65. It was urged by the learned counsel for the petitioner that prayer (B) has only been asked as a consequential of prayer (A) because even without making that prayer if the petitioner succeeds in his first prayer as a consequence petitioner would be entitled to recover the amount from the Stock Exchange under law, and he is free to avail his remedies under any law against the Stock Exchange for the recovery of the sum if in spite of the setting aside of the order it does not discharge its obligation. In view thereof he urged that prayer (B) may be not considered and he be left free to pursue his remedy against National Stock Exchange or any other person to recover sum under ordinary law, if he succeeds in this petition and in that view of the matter National Stock Exchange is not a necessary party for impugning the orders passed by SEBI and Appellate Authority confirming that order. Having carefully considered, I am of the opinion that so far as the challenge to orders passed by SEBI of 25.1.1996 as affirmed by the appellate authority on 22.5.96, Stock Exchange is not a necessary party. At best it can be said to be a proper party but it cannot be said that in the absence of it, the validity of the two orders cannot be challenged. No action of the Stock Exchange is challenged in the petition nor is required to be challenged for the purposes of the relief against the impugned orders claimed by the petitioner. The petitioners challenge rests primarily on the contentions that there is no legal authority for making the impugned order and that the impugned orders have been made without affording an opportunity of hearing. Both the contentions do not impinge upon any actions of the Stock Exchange which is required to be gone into. Stock Exchange merely acted under the directions of the SEBI and if the directions failed, the consequence would fallow automatically. Therefore this objection is also not sustained. It is further made clear that in case

petitioner succeeds he is free to pursue his remedies in accordance with law to enforce his claims in appropriate forum if occasion for the same arises.

66. It was also urged that at best the impugned order can be treated to be cancellation of the transaction of purchase entered by the petitioner and by cancellation of transaction he has suffered no loss, nor he has deprived of any of his property because he has never acquired shares or right in the shares delivered of which was not available. At best if the order of transferring the price recovered by the Stock Exchange is held to be illegal, the persons entitled to refund would be short sellers.

67. Arguments on the face of it though felicitious does not stand the test of scrutiny. Firstly this cannot be termed as preliminary objection but concerns the merit of the order. Secondly, orders having come into existence as a result of holding an enquiry and/or subject to further appeal it does indicate the quasi judicial nature of the orders. It is now well established that where an authority whether in exercise of its administrative functions or qua judicial functions makes an order the order speaks for itself and reasons cannot be supplied, by reading something in it which is not there. If the order is read in plain terms, it nowhere reflects that the order is for cancelling the transactions of purchases which remained outstanding. The cancellation of order would automatically mean that nothing in consequence of those transactions would take place. In that event the question of recovery of sums from the short sellers for having acted in contravention of any regulations. There is no such averment nor any indication from any material to suggest that recovery of difference price from the short sellers have been made as a punitive measures against the short sellers with any intention to cancel the transactions. On the other hand, from the directives of the SEBI dated 30.10.1995 reproduced hereinabove it is abundantly clear that from the very start it was the intention of the Board that standing transaction should be carried out and be closed as per the practice of the Stock Exchange either by securing the delivery of the shares at the auction at the last prevalent highest price, and on failure to secure delivery of shares by resorting to

close up by collecting the difference between the transaction price and the last prevailing highest price from short sellers. It has been stated in the reply affidavit that the alleged loss which the petitioner claims is denial of profit arising out of market manipulation, which no trader is entitled to. This clearly indicates that but for the impugned measure it was the profit of the transaction to which the petitioner was entitled and the impugned order has directly resulted in denial of that profit. The petitioner no where lays claim to shares or interest in shares. His case is squarely that amount of difference price recovered by NSE becomes his money after adjusting charges of Stock Exchange on closing up of transaction.

68. It would be apposite to refer to relevant provisions relating to closing out contracts contained in the regulations framed by the National Stock Exchange and known as National Stock Exchange Trading Regulations 1994. According to the latest Regulations placed for the perusal of the Court by the learned counsel for the respondents Regulation 9 in part B deals with the closing out. Clause 9.1.1 states that a contract for securities made subject to rules, bye laws and regulations of the exchange may be closed out by buying in or selling out against a clearing member on his failure to comply with any of the provisions relating to delivery, payment and settlement of deals or on any failure to fulfill the terms and conditions subject to which the deal has been made. Closing out for deals settled through Clearing House is dealt with in clause 9.3. which entitles Stock Exchange to close out the transactions against any party in default on behalf of the receiving or delivering member as the case may be. Clause 9.8 says that the closing out by buying-in or selling-out shall be effected by Exchange initiated auction or by any other method which the Executive Committee or delegated authority may decide from time to time. Clause 9.9. makes it clear that save as otherwise provided the member at whose instance or on whose behalf the buying-in or selling-out is effected by the Exchange for the purpose of closing-out shall be responsible for the deal made and no liability or responsibility shall attach to the Exchange or its employees for any deal made in pursuance of such closing-out. This clause makes it abundantly clear that closing out transactions affect the rights and liabilities of transacting parties alone and not in any manner

holds Stock Exchange responsible for the transaction. Clause 9.10 which is relevant in the present case deals with situation when securities are not bought-in, that is to say, where securities are not available to be delivered to the purchasers where auction is resorted to. It reads:

> "9 10. Securities when not bought-in
> When in spite of the best efforts the securities cannot be bought-in and when the Executive Committee or delegated authority is satisfied that such security cannot be obtained except at an arbitrary price the contract in such security shall be deemed to be closed-out at a price which is not less than the highest price touched at any time in the preceding six months or such price as the Executive Committee or delegated authority may decide from time to time. This price shall be paid to the member entitled to the security to be bought-in."

69. These provisions indicate that, the price at which an outstanding transaction is concluded otherwise than as a result of actual delivery by party to contract is the highest price touched at any time in the preceding six months or such price as the Executive Committee or delegated authority may decide from time to time and it is the person who is entitled to purchase the security becomes entitled to the money recovered by the Stock Exchange in pursuance of closing out. The charges for such closing is to be borne by the member against whom closing out has taken place in terms of clause 9.16. Therefore once closing out of transaction takes place and culminates into the conclusion of the transactions thereof the consequence is that if the closing out results in availability of scrips for actual delivery by delivery of scrips to the purchaser at the transaction price and payment of the price at which the scrips are delivered by person at auction is entitled to the highest price prevalent within the last six months or price as fixed by the Stock Exchange, transaction price being recoverable from the purchaser and the balance from the short seller. In case transaction is settled not by delivery of actual scrips, then, the entire price as per the highest price within the last six months or as fixed by the Exchange which consists of the recoveries made from the purchasers at the transaction price

and short sellers of the difference becomes payable to the person who is entitled to purchase the security under transaction, if available. That is to say he not only gets refund of his part of consideration paid but also the difference recovered from short sellers.

70. Auction procedure or closing out is a method by which outstanding transactions are concluded, and not a process of cancellation of transaction and the purchaser who is entitled to buy the securities becomes entitled to such amount as a result of conclusion of his contract of purchase by closing out. It also clearly indicates that price at which closing out is to take place is highest prevalent price during last six months, that is to say on failure of short sellers to deliver the scrips, the ingredient of earning profit at the difference of highest price prevailing during last six months and the transaction price is the legitimate expectancy of profit, in case of close out. No ground for assuming a wind fall of illegitimate profit can be attributed to a person who enters the market, unless he himself is found to be guilty of fraud, or unfair market practice to that end. Every investor enters the market for earning good profit on his investment. How much he is able to make or lose may depend on his own judgement and market at the time of transactions. Therefore because of hugeness of profit, it cannot be termed as windfall profit. Moreover, the regulation of profits that can be earned at share market is not the authority assigned to SEBI under any of the provisions of the Act.

71. This has exactly happened in the present case. In the first instance when the SEBI intended to hold investigation into the transactions in the shares of RIL had directed that the standing transactions should be closed as per the prevalent practice of either inviting auction or by closing out and it also directed the Stock Exchange to recover the amount as per its bye laws. Therefore from the beginning there was no intention on the part of the SEBI to cancel the outstanding transactions but it had toyed with the idea of dealing with the funds generated as a result of culmination of transaction as it thought fit. Transaction had in fact been concluded on non delivery of scrips by shortsellers as per Stock Exchange bye laws, in consonance of which SEBI also issued directions, by recovering of the price from

short sellers. Therefore as per the regulations of the Stock Exchange on such recovery it became an amount payable to the purchaser. In fact as per the averments made by the petitioner in this petition his part of the consideration which has been made good to the Stock Exchange for concluding the transactions by auction were paid to him but the balance money, the difference recovered from the short sellers, as a result of closing out had not been made to him. If as per the regulations the money becomes payable to the purchaser on being closing out. Any order which affects such right of the purchaser cannot be said to be an order which does not result in affecting the rights of the petitioner adversely so as to keep him away from the category of person aggrieved or a person who has suffered loss. Plea of want of locus standi in the petition for the reason of non existence of any loss or any order adverse to him cannot be sustained.

72. As has been discussed in detail while considering the objections in Special Civil Application 2224 of 1996, I reach to the conclusion that right to receive the full consideration by the offerer of shares at auction or right of purchaser to receive differential amount received by the Stock Exchange as a result of closing out of the transaction or non availability of scrips for delivery is an actionable claim of the offerer of scrips at the auction or the purchaser whose transaction has not been honoured and forms his property, which as a result of directives of the Board to retain that amount to be utilised at the directions of the Board instead of it being paid to the persons who are entitled to it. As the rights of the petitioner to enforce such actionable claim is adversely affected by intervention of SEBI, their locus standi to maintain this petition cannot be doubted.

73. Before proceeding further to the discussions, it may be noticed common premise about which there is no dispute between the parties. Firstly, on the culmination of the transactions in the manner they have been culminated, the amount affected by the impugned orders would be property of the respective petitioners as their actionable claim which they were entitled to recover, but for the orders under challenge. Secondly the impugned orders results in depriving the petitioners of that property. Thirdly, it is the constitutional

requirement under Article 300-A that no person can be deprived of his property save by authority of law.

REQUIREMENT AS TO AUTHORITY OF LAW

74. On the aforesaid premise, apart from various grounds challenging the orders including grounds of violation of the principles of natural justice, abuse of authority, non application of mind, absence of any material and other grounds, the contention at the forefront has been that there does not exist authority of law under which SEBI could issue directions to deprive a person of the property. The Board on the other hand contends that it has necessary authority of law to issue direction depriving a person of such profits which in its opinion, formed as a result of enquiry, are results of transactions from a manipulated market, whether the persons themselves are responsible for such manipulations or not, as a measure of protecting the interest of the investors and orderly development of securing the market or to prevent the affairs of any intermediary or other persons, referred to in Section 12 of the Act of 1992 being conducted in a manner detrimental to the interest of the investors or to the orderly development of security market. For this purpose, it places reliance on Sections 11, 11B of the Act and Regulation 12 of National Stock Exchange Capital Market Trading Regulations, 1995 (hereinafter referred to as `Regulations of 1995') for asserting the requisite authority of law as its command.

75. Article 300-A of Constitution of India reads as under:

"No person shall be deprived of his property save by authority of law."

76. This Article was inserted by Constitution (44th Amendment) Act, 1978 with effect from 20.6.1979. A brief look in the background of insertion of this Article will be apposite. Right to property at the inception of Constitution held its place in part III of the Constitution as part of fundamental rights. Article 19(1)(f) guaranteed every citizen right to acquire, hold and dispose of

the property and Article 31 (relevant clauses (1) and (2)) provided that no person shall be deprived of his property save by authority of law and that no property shall be compulsorily acquired or requisitioned save for public purpose and save by authority of law which provides for compensation for the property acquired or requisitioned. With the 44th Amendment of Constitution, right to property lost its place as fundamental right guaranteed under Part III of the Constitution. It did not lose its recognition nonetheless as a right which was protected. While Article 19(1)(f) and Article 31 both were omitted by 44th Amendment. Article 31 clause (1) was reenacted by inserting it as Article 300-A reproduced herein above. This omission from part III and insertion as Article 300A affected the remedies available to citizen against its violation and took the right away from the inhibition of Article 13. At the same time, it did not alter the precondition required before a person is deprived of his property that there must exist authority of law. The scope and ambit of this requirement, did not alter with aforesaid amendment.

77. First question that calls our attention is what is meant by deprivation of property. Deprivation of property may take place in various ways. It may take place by way of destruction of property, by way of confiscation; by way of revocation of property rights granted by a private proprietor; it may be by way of seizure of goods or immovable property from the possession of an individual or it may result on account of taking over control of the business by State. Compulsory acquisition being one of the form of deprivation was specifically dealt with by clause (2) of Article 31. While property had its character as fundamental right, acquisition of property by the State was not possible without compensation, omission of that clause altogether had made it possible that acquisition by the State, may be without payment of compensation also, without facing the plea of breach of fundamental right or constitutional guarantee of right to property, if the law otherwise has validly been enacted and satisfies other tests about it being intra vires envisaged under the Constitution. However, I need not dwell in detail about this aspect of the matter inasmuch as the parties are not seriously at issue on the question that the impugned order will result in depriving the petitioner of their property, viz., their right to recover the

amount from respective parties which was otherwise recoverable.

78. Existence of a `Law' as necessary prerequisite of certain State actions has been envisaged in various other provisions of Constitution. Article 265 inhibits imposition of levy and collection of any tax unless authorised by law. Article 266(3) prohibits appropriation of any amount of Consolidated Fund except in accordance with law. Article 13 inhibits making of law, which infringes rights protected in Part III of the Constitution except to the extent permitted under such provisions of Constitution.

79. The expression authority of law which has been used in Article 31(1) or Article 300-A or the term used in Article 265 which provides that no tax shall be levied or collected except by authority of law and the phrase `in accordance with law' used in Article 266(3) has been since then subject to judicial interpretation.

80. It has now come to be well settled that `law' means, by or under a law made by the competent Legislature or law made by Subordinate Legislation by way of Bye-law, Rule or Regulation, if the Statute under which Subordinate Legislation is made, specifically authorises making of such law for deprivation of property. The authority of law envisaged under Article 300-A is authority which must be specific in the form of some law made by appropriate legislative process but not by way of executive instructions or by exercise of administrative discretion.

81. It was pointed out by the Supreme as early as in 1954 in Wazir Chand vs. State of Madhya Pradesh reported in AIR 1954 SC 415:

> "that State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts."

82. In Rai Sahib Ram Jawaya Kapoor and others vs. State of Punjab (1955(2) SCR 225), Mukherjee, C.J., speaking for the court while considering the provisions of Article 266(3) of the Constitution which provides that no money out of the consolidated fund of India or consolidated fund of the State

shall be appropriated except in accordance with law opined:

"Under Article 266(3) of the Constitution, no money out of the consolidated fund of India or consolidated fund of the State shall be appropriated except in accordance with law and for the purpose and in the manner provided in this Constitution. The expression law, here obviously includes the Appropriation Act."

83. In Bishan Das and others v. State of Punjab (AIR 1961 SC 1570) the Court reiterated its view in Wazirchand's case that State or its Executive offices cannot interfere with the rights of citizens unless they can point to some specific rule of law which authorises their acts.

84. In Gulam Hussain vs. State of Rajasthan (AIR 1963 SC 379) question arose whether the Collector, Sirohi had authority of law to levy and collect custom duty on export of Char Coal out of State of Sirohi. The State took the plea that the order issued under the signature of Rajmata of Sirohi, President of Board of Regency and Administering State of Sirohi, was the law conferring authority to levy and collection of custom duty. The court rejected the contention by holding -

"Since the Board of Regency was alone clothed with the necessary legislative authority and unless the Board passes a resolution, it cannot take effect as a law in the State of Sirohi, the approval of the Rajmata to the State Council cannot cure the infirmity arising from the fact that the State Council had no legislative power"

85. In the absence of any legislative enactment, the court did not up-hold the levy notwithstanding the fact that Rajmata was de facto ruler of the State at the time and was competent to exercise the necessary power to pass the impugned order which weighed with the High Court, but did not find favour with the Supreme Court.

86. In the case of R. Abdul Quader and Co., v. Sales Tax Officer, 2nd Circle, Hyderabad reported in AIR 1964 SC 922 a question arose before the Supreme

Court in respect of Hyderabad General Sales Tax Act, Section 11(2) of which provided that though the amount may have been collected by the dealers by way of tax, it was not exigible as tax under the Act shall be paid to the Government; and if not paid over, the same shall be recovered from such person as if it were arrears of land revenue, whether it was a valid provision of law. The Court held with reference to Article 265:

> "If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly, for it is not a tax at all within the meaning of Entry 54 of List II nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly.

87. A controversy of the like nature again came up before the Supreme Court in a different circumstance in R.S.Joshi v. Ajit Mills Ltd & Anr. reported in AIR 1977 SC 2279. That was in relation to Section 37 of the Bombay Sales Tax Act which provide for forfeiture of sum collected by dealers by way of sales tax though not exigible to the public exchequer punitively. The Court, while generally agreeing with the principles enunciated in Abdul Quader's case (supra), drew a distinction between the ratio laid down in Abdul Quader's case on the ground that while it was construing a provision providing for recovery simpliciter, the case in Bombay Sales Tax arose out of a provision for forfeiture of sum collected by a dealer which was not tax payable under the Act was construed as punitive measure for something done by the dealer contrary to the provisions of sales tax concerning the authority of the dealer to collect the amount of tax payable to the State exchequer of sales transacted by him from the purchasers. The Court opined that since the authority of the dealer to collect the tax payable on a transaction was a part of substantial law authorising levy and collection of tax, if a tax has been collected in breach of that law, and law provide for penalty for such

breach of law, such penalty provision is incidental to main provision of levy and collection. The legislative competence to enact on a particular subject includes authority to enact in respect of all ancillary and incidental matters, providing for penalty measure being authority to provision of recovery was also within competence of the State Legislation. However, it is to be noticed in both cases, that while in Abdul Quader's case, recovery was authorised by statute, in R.S.Joshi's case (supra) forfeiture of the sum recovered by the dealer contrary to the provisions of the Act was subjected to the forfeiture. In both the cases, before action for recovery or levy of penalty could be taken, statutory sanction was felt necessary. The two cases also brings out the distinction between the provision authorising mere recovery of the sum recovered by a person from another person unauthorisedly was treated only as a tax and providing for forfeiture of such unauthorised recoveries by way of penalty in such case, it is to be treated as an authority incidental to execute the provisions of law. For want of Legislative competency or necessary constitutional authority for mere recovery of the sum even the statutory authority was held to be invalid. While in the later case, it was held to be ultravires.

88. In State of Madhya Pradesh vs. Bharat Singh (AIR 1967 SC 1170), question arose slightly in different shade. Article 73 of the Constitution envisages that subject to the provisions of constituting the executive power of the Union extend to the matters to which the Parliament has power to make laws. Like-wise Article 162 provides for executive power of the State to extend to the matters with respect to which the Legislature of the State has power to make laws, i.e., to say the executive power of the State is coextensive with the Legislative power of the State Legislation.

89. In Jawaya's case (1955(2) SCR 225), the Supreme Court has held that language of Article 162 clearly indicates that powers of the State executive are coextensive with the matters upon which the State Legislature is competent to legislate and is not confined to the matter over which the Legislation has been passed already. It was urged before the Supreme Court in Bharat Singh's case that even if there is no Legislation in support of the impugned act, as the State has Legislative power to

enact in respect of the subject matter in respect of which the State action has been challenged, hence it has necessary authority to support the action while exercising its executive power which is coextensive with legislative power. The Court repelled the contention and explained the observation made in Jawaya's case by pointing out that though the action in Jawaya's case was not supported by legislation but it did not operate to prejudice of any citizen and the court had held that by the action of State Government no rights of the petitioners were infringed since a mere chance of having particular customers cannot be said to be a property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen; the State has merely entered upon a trading venture, it did not infringe their rights and concluded:

> "Viewed in the light of these facts, the observation relied do not support the contention that the State or its Officer may in exercise of the executive authority infringe the right of the citizen merely because the Legislature of the State has power to legislate in regard to the subject on which the executive order is issued."

90. This decision was further reaffirmed and clarified in a latter decision in H.L.Mehra vs. State of Maharashtra reported in AIR 1971 SC 1130. The question had arisen regarding levy of the custom duty in case where some one had sent goods from Goa to Bombay in 1962 after Goa had been liberated and become part of Indian territory. It had ceased to be a foreign State and became a Union territory. As it was a transport of goods within the territory of India, a question was raised that there was no authority of law to levy the custom duty. The plea was taken that custom duty on the articles in question was levied because of certain administrative instructions. Hegde, J., speaking for the court said:

> "No tax or duty can be levied or collected except by authority of law and no custom duty was leviable on the basis of any administrative instructions. Every levy or custom duty or any other tax must be sanctioned by law."

91. Thus, in the absence of any legislative sanction authorising the levy of tax, the imposition of tax in exercise of executive power was negatived. It may be noticed that exercise of executive power under Article 162 or Article 73 is subject to other provisions of the Constitution which includes Articles 265 and 300-A as well.

92. Question directly arose in Bishambhar Dayal Chandra Mohan and others vs. State of Uttar Pradesh and others and batch of writ petitions before the Supreme Court in (1982) 1 SCC 39 on the interplay of Article 162, the executive power of the State in matters for which it was legislative competence and Article 300-A. The question was about seizure of wheat. Justice A.P. Sen speaking for the Court said:

> "There still remains the question whether the seizure of wheat amounts to deprivation of property without authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive the person of his property. Such power can be exercised only by authority of law and not by an executive order. Article 162 as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore necessarily subject to Article 300-A. The word law in the context of Article 300-A must mean an act of Parliament or of a State Legislature, a rule or a statutory order having the force of law, i.e., the positive or state made law."

93. The court also reaffirmed the view stated in Wazir Chand vs. State of Himachal Pradesh (AIR 1954 SC 415) and Bishan Das vs. State of Punjab (AIR 1961 SC 1570) that an illegal seizure amounts to deprivation of property without authority or law. It clearly spells that an order of seizure of property by any authority dealing with enforcement of law or as an investigating agency as a measure of making law effective amounts to deprivation of property and unless such seizure is authorised by statute under which it is acting, the seizure will be illegal and cannot be considered authorised by

law which could be saved, merely because it can be said to be to fulfil the object of the enactment as being remedial against breach of law.

94. From the aforesaid authorities it is abundantly clear that whether it is a question of finding whether a tax is authorised by law or a person is deprived of his property by authority of law or appropriation of consolidated fund is in accordance with law, the law in the context means an act of Parliament or of a State Legislature or a rule or statutory order having force of law, i.e., a positive or State made law and not a mere executive instructions or guide lines issued in exercise of the executive power of the State or in exercise of such power conferred on any statutory functionary.

95. There is ample authority for the proposition that if the law is not framed by a competent legislation body having plenary power in respect of subject matter but by subordinate authority the delegation in this respect must be specific and not generally for the purpose of carrying out the object of the Act.

96. In the case of Bimalchandra Banerjee v. State of Madhya Pradesh etc. reported in AIR 1971 SC 517, question directly arose. Excise duty on the quantity of liquor was levied which the licensee failed to take delivery. Levy was sought to be supported with the authority of law conferred by rules. The provisions of Madhya Pradesh Excise Act, 1915 conferred on the State power to make rules for the purpose of carrying out the provisions of the Act and also specified certain areas specifically in respect of which rules can be framed. However, there was no specific delegation of power to impose duty on anything in addition to on which duty was payable in terms of Section 25. The Court said:

> "No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive."

97. In M/s. Lilasons Breweries (Pvt.) Ltd. and another vs. State of Madhya Pradesh and others reported in AIR 1992 SC 1393, the question arose

that Rule 22 is provided for empowering the Excise Commissioner to appoint officer in charge in effect also provided that pay of all such officers shall be made by the Government provided that when the annual charges exceed five per cent of the duty leviable on the issue made from the brewery to districts within the State excess shall be realised from the brewer. The raising of the additional demand of excise duty under Rule 22 was challenged. The duty was sought to be defended on the ground that this was a measure to recoup the State of the charges of appointing officers in charge of the various breweries in the State by demanding a sum equal to the duty leviable. The provision of the Rule was sought to be defended on the basis of the generality of the powers of framing the rules for the purposes of the Act. Whether such delegation satisfy the test of Article 265 of a tax imposed to the authority of law. The Court negatived the contention by holding :

> "Now with regard to the suggested wide amplitude of S.62(2)(h) and S.28 and condition of licence, all we need to say is that though under S.28 licences are issued on the prescribed forms and on payment of such fee as prescribed and licences containing such particulars as the State Government may direct etc. this power even though wide is yet confined within its frame and can in no event assume the power to impose or levy a tax or excise duty by means of a rule without the sanction of the Act."

98. In Ahmedabad Urban Development Authority v Sharadkumar Jayantikumar Pasawalla and others reported in AIR 1992 SC 2038, affirming the view taken by this Court in AIR 1984 Gujarat 60 held that since there is no express provision for imposition of fee and the State Government has not delegated any power to the Development Authority to impose fee for development, the regulations framed for such imposition of fees and the demands made therefor are wholly unauthorised and illegal and reiterating the view taken by the Supreme court in Hingir Rampur Coal Co. Ltd. v. State of Orissa, AIR 1961 SC 459, Sri Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400 and Delhi Municipal Corporation v. Mohd. Yasin AIR 1983 SC 617 reaffirmed:

> "It has been consistently held by this Court that whenever there is compulsory exaction

of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used"

The Court unequivocally held that :

"In a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee."

99. This case lays in no uncertain terms that there is no room for intendment where question arose about exercise of power for exacting moneys from subjects. In view of constitutional mandate of like character in Article 265 and 300A, it applies with equal force to cases of levy of tax or fees or an action resulting in depriving a person of his property.

100. The proposition may be viewed slightly from different angle even with reference to Article 300A. In Tuff and Sons vs. Priester (1887) 19 QB 629 Lindlay L.J. said:

"The well settled rule that the court will not hold that the penalty has been incurred unless the language of clause which is said to impose it is so clear that the case must necessarily within it."

101. Principle was applied by House of Lords in L.N.E.R. vs. Berriman 1946(1) AER 255, Lord Macmillan in his opinion said :

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

The same view was expressed by Lord Porter when he opined:

"A man is not to be put in peril upon ambiguity however much or little the purpose of the Act appeals to the predilection of the Court."

102. Construing the provisions of Bombay Act No. 57 of 1947, in the case of Tolaram Relumal and another, v. The State of Bombay reported in AIR 1954 SC 496, the court approved the opinion of Lord Macmillan in Berriman's case (supra) by holding :

"It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the function of the legislature."

103. These were with reference to interpreting existing penal provision. It is a clear indication that even where a provision for levy of penalty exists and is ambiguous in its expression a person cannot be subjected to such provision by stretching the same. Therefore, it is not possible to subject a person to penal consequences of his acts without there being a specific provision at all on the basis of intendments alone.

104. Decision in Indian Council for Enviro Legal Action v. Union of India (AIR 1996 SC 1446) was also referred to, where the Apex Court in a petition under Article 32 directed the Central Government to recover costs of remedial measures from Companies to urge that recovery of cost from polluting company amounted to depriving the company of its property under general power of taking remedial measures to prevent pollution. In my opinion, their contention is not well founded. It is to be noticed that the Court in the said case applied law enunciated in Oleum Leak Case (AIR 1987 SC 1088) holding respondents companies No.4 to 8 liable to compensate for harm caused by them to villagers and bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area and to defray the cost of remedial measure required to restore the soil and the underground water sources. The court also applied the principle that polluter pays. The Court held:

"We are convinced that the law stated by this Court in Oleum Gas Leak Case (AIR 1987 SC 1086), is by far the more appropriate one - apart from the fact that it is binding

upon us. (We have disagreed with the view that the law stated in the said decision is obiter). According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity "can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not."

The Constitution Bench has also assigned the reason for stating the law in the said terms:

"It is that the enterprise (carrying on the hazardous or inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers and not the person affected and the practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise.

Once the law in Oleum Gas Leak Case (AIR 1987 SC 1086), is held to be the law applicable, it follows, in the light of our findings recorded hereinbefore, that respondents Nos. 4 to 8 are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area."

The Court further said:

"The question of liability of the respondents to defray the costs of remedial measures can also be looked into from

another angle, which has now come to be accepted universally as a sound principle, viz., the "Polluter Pays" Principle.

"The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution. Under the principle it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer."

105. Thus the obligation to defray the cost of remedial measures of removing pollution was held to be of the polluter under common law. Issuing directions for recovery of such cost was therefore held to be implicit in provisions of Section 3 and 4 of the Environment Protection) Act.

106. Thus liability to incur cost being already implicit in existing law no new or fresh authority was required in this regard. It was not a case where the Court has countenanced any forfeiture as a penal measure for breach of some provision without any pre existing authority of law to bring that effect.

107. Reference was made to Jilubhai Nambhai Khachar vs. State of Gujarat (AIR 1995 SC 142). The issue related to acquisition of agrarian and mineral rights under Bombay Land Revenue Code and Tenure Abolition Laws (Gujarat Amendment) Act 1982 without payment of compensation. The statute was placed in 9th Schedule of the Constitution under Article 31A. Apart from other contentions, it was also contended that Section 69A being violative of Article 300A cannot be under protective umbrella of Article 31A.

The court held firstly that

"After deletion of right to property omitting of Articles 19(1)(f) and 31 of the Constitution by the Constitution 44th Amendment Act, the right to property which was hither to a fundamental right was dethroned from Part III and became a

constitutional right under Article 300A resuscitating only Article 31(1) of the Constitution as original made."

108. It also reiterated the view taken by Bose J. in State of West Bengal v. Subodh Gopal Bose (AIR 1954 SC 92) that the words `taken possession or acquisition' under Clause (2) amounts to deprivation within the meaning of Clause (1) of Article 31. No hard and fast rule can be laid down. Each case must depend on its own fact. The court said in para 42:

"Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word `property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law."

It reiterated :

"The word "property" used in Article 300A must be understood in the context in which the sovereign power of eminent domain is exercised by the State and expropriated the property. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting. The phrase `deprivation of the property of a person' must equally be considered in the fact situation of a case. Deprivation

> connotes different concepts. Art. 300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in accordance with the law made by the Parliament or of a State Legislature, a rule of a statutory order having force of law. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Art. 300A nor exercise of eminent domain an acquisition or taking possession under Art.300A. Generally speaking preservation of public health or prevention of damage to life and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or possession taken under Art.300A. It would be by exercise of the Police power of the State. In other words, Art.300A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without any sanction of law. Deprivation by any other mode is not acquisition of taking possession under Art. 300A. In other words, if there is no law, there is no deprivation. Acquisition of mines, minerals and quarries is deprivation under Article 300A."

109. It transpires from above that the Court was dealing with extinguishment of mineral right, which was held to be deprivation of property within the meaning of Article 300A, in the specie of acquisition by invoking the principle of assuming eminent domain over the rights in minerals. It also is clear that what is `deprivation' in a given case must be decided in the context of facts of that case. It also cleared that deprivation by acquisition or taking possession is different from deprivation by reference to police powers because the context of the controversy was that whether in the case of deprivation by acquisition existence of public purpose and concept of adequate compensation are implicit. While the Court answered the first requirement of existence of public purpose in affirmative, the latter was negatived by holding:

"Since Art. 30(2) itself provided payment

> of compensation, when property was acquired preceding 25th Constitution Amendment Act, 1971, this Court interpreted the word "compensation" as aforesaid, but when Art. 30(2) itself was omitted from the Constitution, the question arises whether payment of compensation is a sine qua non for deprivation of property under Article 300A?"

110. It is clearly reflected from the observation that deprivation of property for any purpose other than public purpose would not amount to acquisition or possession taken under Article 300A.

111. It did not lay that what is not acquisition is not deprivation of property and could be sustained without authority of law envisaged under Article 300A contrary to principle enunciated in Wazirchand's case AIR 1954 SC 415 and in Bishanmbhar Dayal Chandra Mohan's case ((1982)3 SCC 39) which laid down that forfeiture of property for alleged breach of law amounted to deprivation of property and unless authorised by specific law could not be sustained under Article 31(1)/300A.

112. The decision rather reaffirms and reiterates the principle above the necessary requisites of authority of law laid down by Supreme Court in each case as discussed above, and has also drew attention to effect of omission of clause (2) of Article 31 in resuciated provision of Article 31 in Article 300-A on the question of requirement of payment of compensation on assuming eminent domain of any property by way of acquisition. The question of finding the ambit and scope of deprivation through taking possession or acquisition of property by assuming eminent domain not arising in this case. The question, whether impounding, full or part of amount, otherwise recoverable in law from a person, amounts to deprivation was not the subject matter of issue in Jilubha's case. However, this much can be said that decision in Jilubhai's case reaffirms the principle firstly that there can be no deprivation of property without authority of law, secondly what amounts to deprivation of property cannot be subject to any abstract principle. No hard and fast rule can be laid down. Each case must depend upon its own facts, and that the word `law' used in Art. 300A must be an Act of Parliament or of State Legislature, rule or statutory order having force of

law.

113. Learned counsel for the respondent urged to draw distinction between imposition of tax required to be authorised by law under Article 265 and authority of law required for depriving a person of his property under Article 300-A by holding that while construing fiscal enactments which are to be construed strictly, the authority to impose tax may be required to be specific in the matter of deprivation of property under remedial statutes. Such authority may be inferred from generality of powers conferred. This distinction pointed out by the learned counsel appears to be without difference. It may be pointed out at the cost of repetition, that in Bishandayal Chandramohan case (1982) 1 SCC 39, the question has directly arisen with reference to the question of forfeiture of wheat under the Essential Commodities Act and orders framed thereunder. It was not a taxing statute but where seizure and confiscation of wheat had taken place. Stock of wheat was held by the petitioner in contravention of the provisions of the Act impinging the object for which such regulatory measure has been enacted. Question directly arose whether such confiscation in effecting the object of the Act results in deprivation of property and if so whether necessary authority of law for such deprivation was needed and existed under Article 300A. Essential Commodities Act is as much a remedial Act as the present one is, though in different field of economic activity. Both the Acts are not enacted merely with the object of depriving any person of his property or conferring mere police powers on the authority constituted under it. Rule or a Statutory order having the force of law that is positive or State made law was held to be essential to back such act. In view of the aforesaid, it is not possible to accept the contention of the learned counsel about drawing a distinction of requisite authority under Article 265 or under Article 300-A, where the Constitution requires a like pre condition before a tax is imposed or a person is deprived of his property. I may also notice that since a separate provision has been made for imposition of tax under Article 265, the imposition of tax has not been held to be deprivation of property to be governed by Article 300-A.

114. Learned counsel for the respondent placed reliance in this connection on decisions in The

District Council of the Jowai Autonomous Distt. Jowai and others v. Dwet Singh Rymbai etc. reported in AIR 1986 SC 1930 and in Khargram Panchayat Samiti and another v. State of West Bengal and others reported in (1987) 3 SCC 82 distinguished in the decision in Ahmedabad Urban Development Authority on the ground that the Supreme Court itself has distinguished the two cases relied on by the Ahmedabad Urban Development Authority in its favour to come to a different conclusion. The fact that the decision in Ahmedabad Urban Development Authorities case distinguishes the two authorities does not lead to the conclusion that it supports the respondents plea about inferring an authority of law without there being specific provision merely from the entitlement of the Board to take appropriate measures without actually taking such measure which can properly be permitted as law prescribing the deprivation of property which could be permitted as a legislative measure prescribing for such consequences by law. As pointed out by the Supreme Court itself the decision in District Counsel of Jowai Autonomous District, Jowai was justified on the ground that authority to levy fee by the District Counsel flew from the special provisions of the Constitution itself under which it was constituted. The Court notwithstanding holding that the District Counsel could levy fee under paragraph 3 of the 6th Schedule to the Constitution, but the levy was not upheld because no material was placed before the court to justify the fees which must be levied as quid pro quo for service rendered by the District Counsel for Forest owners as contractors. It was a case where specific authority for levy was existing under the constitutional provision itself and does not render any assistance to the respondents in their plea to the contrary.

115. The case of Khargram Panchayat Samiti and another v. State of West Bengal and others reported (1987) 3 SCC 82 also does not throw any light on the controversy raised before me which concerns the requisite authority of law envisaged under Article 300-A for sustaining any State action and results in deprivation of his property. It was a case where the Panchayat Samiti while exercising power to grant a premise to hold a hat or fair on account of there being two competitive agencies holding hat on the same day after a checkered history of litigation had specified a day in the case of each one of the holders of hat or fair. It was challenged on the

ground that the Panchayat Samiti had no power to specify a day on which said hat or fair should be held. The court reversing the decision of the High Court held that :

> "The conferment of the power to grant a licence for the holding of a hat or fair under Section 117 of the Act includes the power to make incidental or consequential orders for specification of a day on which such hat or fair shall be held.....It is well accepted that the conferral of statutory powers on these local authorities must be construed as impliedly authorising everything which could fairly and reasonably be regarded as incidental or consequential to the power itself."

116. It is this later part of the aforesaid ratio which is emphasised by learned counsel for the respondents for making a distinction between the decision in AUDA which concern levy of fee from the person which concerns deprivation of property. With all the deference to the learned counsel it may be noticed that reason for inapplicability of the case to such requirement of a specific provision has been stated by the Supreme Court in the following words:

> "That the decision in Khargram Panchayat Samiti also deals with exercise of incidental and consequential and the same does not impose tax and fee the same can be said with respect to the present proviso. Here we are concerned with the power of authority to deprive a person of the property and in exercise of power in the field of administrative law by way of making orders incidental or ancillary power actually conferred on it."

117. In view of the consistent view taken by the Supreme Court as discussed above whether under Article 265 or Article 31 as it existed prior to its deletion in Constitution 44th Amendment act, 1978 or under Article 300-A, it is not possible to accept the plea of distinguishing the scope and ambit of authority of law required under Article 300-A by separate rules of construction.

118. The authority of law envisaged under the constitutional provisions has a precondition before

imposition of tax or sustaining said action depriving a person of his property there must exist an authority of law in the form of a positive or State made law whether as an Act of Parliament or of a State Legislation or Rule or a statutory order having the force of law, that is to say a rule of conduct framed by some legislative process or under some legislative authority having the force of law and such law must be specific in conferring such authority on the State functionaries implementing the law. There is no room for intended authority, or exercise of power resulting in deprivation of property as a necessary adjunct of the main power, by way of its ancillary or incidental requirement as in the field of administrative action is no answer to law of specific legislative authority.

119. Learned Counsel also placed reliance on State of Uttar Pradesh and Another v. Synthetics and Chemicals and Another reported in (1991) 4 SCC 139. For the purpose of contending for interpretation of a statute that well accepted principle of being strictly construed and and requirement of power before a tax can be imposed is a different proposition compared to the interpretation of a remedial legislation concerned inter alia with imposing suitable action to remedy a breach of Regulation and Act. The decision in Synthetics and Chemicals (supra) does not concern the issue with which the case in hand required concern. The issue before the Supreme Court related to field of operation of entry 54 of list 2 of 7th Schedule empowering the said legislation to levy sales tax and entry 52 of List 1 under which the Parliament has enacted Industries Development and Regulation Act. Contention had been raised that while in the field occupied by the law enacted by Parliament challenging the levy of purchase tax on industrial alcohol, it was in the light of contention raised that exercise of power by Parliament in enacting law relating to the development and regulation of industry of industrial alcohol, whether the power of State Legislature to levy purchase tax or sales tax on sale of industrial alcohol correctly under Entry 54 of list 2, it was in the context of this contention that one of the Honourable Judges of the Supreme Court Justice Thomas held that the control held and exercised by the Central Government by virtue of provisions of Industrial Development and Regulation Act is not a field far removed from the tax under Entry 54 list 2

so long as it is within the control of the Central Government in its power under the Act in respect of a controlled industry falling under Entry 52 of the list 1 cannot in any manner prevent the State from imposing the tax on the sales of purchase of goods which are the products of such industry and which are referred to in Entry 33 of list 3. As seen above, the taxing power of the State under Entry 21 of the power of control. Sahai, J concurring with Justice Thomas held :

> "Therefore the entire basis for striking down the levy that even though the State had plenary power to impose tax on sales/purchase of goods it can exercise taxing power under Entry 54 of List II so long as it does not militate against the legislative field occupied by the Central Government under the IDR Act or any other enactment made under Entry 53 of List I proceeded on complete misconception of taxing powers of State. In fact as stated earlier the entire theory of occupied field or State legislation being repugnant to Central legislation is available when the two legislatures exercise their powers under Concurrent List. Therefore, the order of the High Court striking down the levy cannot be upheld.

120. The decision in Synthetics and Chemicals case nowhere militates against the earlier views expressed by the Apex Court about the requirement of specific provision of law whether of an Act of Parliament or State Legislature or Rules or Regulations or Statutory order having force of law by way of positive State made law or that while examining the issue about the existence of a law authorising deprivation of property different yardstick about finding out the existence of law be applied is not sustainable for the reasons discussed above.

121. It was strenuously urged by learned counsel for the respondents that the Act being remedial in nature must receive broad interpretation which further the object of the Act rather than which allow the mischief to remain unsuppressed.

122. There cannot be any doubt about the principle which has been settled since Heydon's

case. However this question cannot be answered in a pedantic way by reading requirements of law to be there in a statute even if they are not there particularly when existence of such requirements are to be considered in the light of constitutional mandate. The contention that there should be a different methodology while construing the taxing statute and a welfare statute for the purposes of giving effect to it also cannot be seriously doubted. However this principle has to be read in the context of purpose for which tools of interpretation are applied. Where the question under consideration is whether under the existing provision a subject can be subjected to levy, rule of strict construction is invoked. Paramount consideration is that no subject can be put to more burden than what flows strictly within the four corners of statute. By expansive meaning on the basis of intendment the burden cannot be extended. Where the question arises whether the benefit extended by the statute, reaches to beneficiaries for whom such benefits are intended, a liberal construction is resorted to make the reach of such benefits expansive to subjects intended to be benefitted by it. But at the same time one has to keep in mind that the constitutional provisions which are salutary in nature and provides certain constraints on the State action for bringing about a desired result, the scope and ambit of such restraints cannot be different while construing the exercise of State power in that regard. As has been noticed above, and about which there is no dispute either that the impugned action results in depriving the petitioners of their property within the meaning of Article 300-A of the Constitution and for bringing about that desired result, the authority of law is needed. It is also not in serious dispute that the authority of law required must be an authority conferred by legislative process and not by way of administrative discretions. In fact the learned counsel in his written submissions has candidly stated that authority of law envisaged under Article 265 for the purpose of imposing tax requires a specific power before it can be imposed. What is contended by learned counsel is that interpretation of a taxing provision, with this well accepted principle of being strictly construed and requiring of a specific power before a tax can be imposed, is a different proposition compared to the interpretation of a remedial legislation concerned inter alia while taking action to remedy a breach of

Regulation and Act. Pausing here it is the constitutional mandate that no tax shall be imposed without authority of law. It is also constitutional mandate that no person shall be deprived of his property unless authorised by law. So far as this requirement of the Constitution of existence of authority of law before tax can be imposed or a person can be deprived of his property, in my opinion, cannot be different in either cases, and the existence of authority of law as distinguished from the question of mere acceptance of the fact that such authorisation it made may be justified being incidental to the object of the Act cannot be accepted. If authority of law for the purposes of imposition of tax is required to be specific because of the Constitutional mandate, the authority of law authorising the State or instrumentality of a State to deprive a person of his property must also be held to be specific and cannot be left to be justified on the basis of acceptance of such authority for the purpose of achieving the object.

123. In Heydon's case, in 1584, it was resolved by the Barons of the Exchequer by stating,

> "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1st), What was the common law before the making of the Act. (2nd). What was the mischief and defect for which the common law did not provide. (3rd.). What remedy the Parliament hath resolved and appointed to cure the disease of the common wealth. and, (4th), The true reason of the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life tot he cure and remedy, according to the true intent of the makers of the Act."

124. This principle has since then been approved by the Supreme Court on more than one occasion. The limits of applying the rule in Heydon's case were also pointed out by the Apex Court time and again. In CIT, Madhya Pradesh and Bhopal vs. Sm. Sodra Devi reported in AIR 1957 SC 832, the Supreme Court said that the Rule in Heydon's case is applicable only when the words in question are ambiguous and

are reasonably capable of more than one meaning.

125. In Kanai Lal Sur v. Paramnidhi Sadhukhan reported in AIR 1957 SC 907, Gajendragadkar, J, speaking for the Court said that in applying the observations in Heydon's case to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

126. It was further pointed out that the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct.

127. In a recent case from House of Lords in Maunsen Olins 1975(1) All ER 16, Lord Simon explained that the rule in Heydon's case is available at two stages primary and secondary. The primary rule of construction is to consider the plain meaning and if there is no plain meaning mischief rule is the most important rule amongst the secondary cannons of construction.

128. As we shall presently see a number of authorities have been cited by the learned counsel for the respondents in this regard but none relates to a situation where question had arisen in the context of satisfying the constitutional requirements for sustaining the said action particularly in the field of requirement of authority of law, nor such authority support the contention that for finding whether authority of law exist for the purposes of imposition of tax or for the purposes of depriving a person of his property

different standards of such requirement has been applied by adverting to the Heydon's principle to satisfy the test of constitutional requirement of such an authority.

129. M.Narayanan Nambiar v. State of Kerala reported in AIR 1963 SC 1116, on which reliance was placed by learned counsel for the respondents for the liberal interpretation of Section 11, was a case in which provision for punishment was made by statute, the question which fell to be considered before the Supreme Court was whether a particular act could be considered to be within the scope of the provisions of Prevention of Corruption Act, for the purposes of prosecuting and punishing a person. It was not a case where a penalty or punishment was sought to be imposed without there being a provision for it. Here also we are not concerned with the case for considering the question `should a consequence provided by statute befell a person for an act of his which could be construed falling in prohibited practices to make the provision effective'.

130. Learned counsel referred to Surendra Kumar Verma etc. v. The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and Another reported in AIR 1981 SC 422, wherein the Court said :

> "Welfare Statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make in roads by making etymological excursions.

131. The Court was concerned with interpretation of Section 25F of the Industrial Disputes Act, 1947. In the context of relief to be granted where termination was held to be contrary to the provisions of Section 25F. Against the claim of the workman whose retrenchment was found to be in breach of the provisions of Section 25F of the Industrial Disputes Act to reinstatement with full backwages, a plea was put forward by the management that Industrial Disputes Act did not render the termination of a service of the workman void ab initio and would make it invalid and inoperative that the court without setting aside the termination

of the services of the workman on the ground of failure to apply the provisions of Section 25F has full discretion not to reinstate the workman with full backwages may mould the relief to reinstatement with payment of suitable compensation. Parity was drawn between the cases under Section 33 and 33A of the Industrial Disputes Act.

132. It is in the context of the said contention, the court made it clear :

> "The Court is not to make inroads by making etymological excursions. `Void ab initio', `invalid and inoperative' or call it what you will, the workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services of the workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too."

The Court further made it clear:

> "That there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages.

Obviously, present is not a case of this nature.

133. In Works Manager, Central Railway, Workshop, Jhansi v. Vishwanath and others reported in AIR 1970 SC 488, the court was required to consider whether the timekeepers who were preparing pay sheets of workshop staff maintained leave account, disposed of settlement cases, maintained records for statistical purposes, maintained attendance of staff, job card particulars of the various jobs under operation and time sheets of the staff working on various shops dealing with the production of Railway spare parts and repairs etc. fall within the definition of the worker in the factories so as to be entitled to the benefits of Factories Act. Rejecting the plea that the deletion of the word `whatsoever' after `any other kind of work' from the

definition of the workmen made any difference between the meaning of the word `workman' in the Act, the Court held :

"Keeping in view the duties and functions of the respondents as found by the learned Additional District Judge, we are unable to find anything legally wrong with the view taken by the High Court that they fall within the definition of the word "worker".

It therefore held that :

"The definition of "worker" in the Factories Act, therefore, does not seem to us to exclude those employees who are entrusted solely with clerical duties, if they otherwise fall within the definition of the word "worker".

134. This case also therefore refers to whether within the definition provided of the Act, a particular class of worker would fall within the operating field of the Act so as to be entitled to the beneficial provisions of the Act and did not concern whether the specific requirement of the Constitution necessary for conferring the power has been fulfilled or not by applying the principle of liberal interpretation of a welfare legislation.

135. Reliance was also placed on Krishnachandra Gangopadhyaya etc. vs. The Union of India and others reported in AIR 1975 SC 1389. It was a case where in the first instance Rule 20(2) of Bihar Minor Mineral Concession Rules, 1954 framed by the Bihar Government under Section 15 of Mines and Minerals (Regulation and Development) Act, 1957 were held by the Supreme Court to be ultravires the authority of the Bihar Government's power to frame Rules under Section 15 in Baij Nath Kedia v. State of Bihar, AIR 1970 SC 1436. The Parliament enacted thereafter Validation Act, 1969 which provided the laws specified in the laws and objects as valid as if the provisions contained therein has been enacted by Parliament. The Act also validated the action taken under the Rules which have been declared invalid by the above referred decision of the Supreme Court. The Court held:

"If a validating law by Parliament merely validates invalid State law which is outside

> the State list, such a validating Act would be invalid. It is for the Constitution, not Parliament, to confer competence on State Legislatures. But where Parliament, which has power to enact on a topic actually legislates within its competence but, as an abbreviation of drafting, borrows into the statute by reference the words of a State act, not qua State Act but as a convenient shorthand, as against a long hand writing of all the sections into the Central Act, such Legislation stands or falls on Parliament's legislative power, vis-a-vis the subject. The distinction between the two legal lines may sometimes be fine but always is real".

136. In its Validation Act, the Parliament clearly stated two things, firstly, that the laws specified in the Schedule shall be and shall be deemed always to have been, as valid as if the provisions contained therein had been enacted by Parliament and secondly that they shall be deemed to be valid as if the provisions contained therein had been enacted by Parliament.

137. Therefore, clearly it was a case of Parliament adopting language of the statute framed by State Legislature as if it was enacted by the Parliament itself. It therefore was not a case where Parliament's competence to enact on the subject but was clearly a case of where Parliament instead of itself giving a detailed draft adopted the language of law enacted by the State for the purpose of its own enactment. The Court was called upon to consider this latter situation and answered the question as quoted above with reference to the principle of giving purposive interpretation, to the fiscal or remedial statutes. It cannot be said that the Supreme Court applied the principle of Legislation by reference or incorporation de hors existing constitutional limits to infer the fulfillment of the constitutional requirement when the same had not been complied with.

138. In this connection reference was also made to Union of India v. Sankalchand Himatlal Sheth and another reported AIR 1977 SC 2328 to buttress the aforesaid contention of purposive interpretation of a remedial legislation. I am unable to read any such proposition in the said case. The case concerns the interpretation of Article 222 of the

Constitution which provides for transfer of a Judge of the High Court from one High Court to another High Court. The question arose was whether before transfer takes place consent of the concerned Judge is required. The question had arisen in the absence of specific provision. The question which the posed for its decision was Since Article 221(1) does not provide for such consent as necessary, the question whether one can still read into this Article words which are not to be found by tools of statutory interpretation. Statutory interpretation, when conflicting rules operating in different directions becomes a murky area. One contention raised was that constitutional provisions must be construed literally and rules of interpretation of statutes applied to legislation made by Parliament may not be applied to interpretation of Constitution. It is in that context the court said:

> "What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the court would be justified in construing the words in a manner which will make the particular provision purposeful."

139. In saying so the court referred to its earlier decision in Pentiah v. Veeramallappa (AIR 1961 SC 1107), wherein the court quoted with approval the words of Lord Denning's illustrating the role of interpreter in such cases by holding that

> "a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

140. In the context of the present controversy, it is not the contention of the any of the parties that any provision or Act, Regulation or Rules is not compatible with each other and requires harmonious construction requiring the ironing out of creases with reference to the requirement of Article

300-A, the remnant of Article 19(1)(g) and Article 31 since deleted, is that the authority of law for depriving a person of his property requisitioned under the Constitution need be specifically through a law framed by legislative process. No decision contrary to the one referred to above have been cited at Bar. If that be so, the question whether the court should supply the authority which is not existing in the Act, rules or Regulations framed therein by reading something there which is not there or applying the principle of omises quasa really had been called for application of the principle of interpreting the words of an existing remedial statute, in a meaning different from what they convey to the words used in it. As has been noticed above, that what has been envisaged under section 11 confers power on the Board to adhere to plan of action for achieving the objects of the Act for which a duty has been caste upon it. It necessarily mean that it requires in the first instance drawing a plan of action which may be called measure to be taken by the Board and then to act in accordance with the action plan. However, the existence of the action plan or chalking out of action plan before the action can be taken in furtherance thereof is a sine qua non. It has also been noticed that chalking out of that action plan may be through the legislative process which may be fulfilling the requirement, subject to other constitutional restraints or not can be fully examined only when such an action plan is formulated. But until that is done, it is difficult to accept the contention of the learned counsel for the respondents to arrive at a desired result by applying principles in Heydon's case, to read requisite legislative authority of law requisite for depriving a person of his property in terms of Article 300-A, in terms of Section 11 read with Section 11-B.

141. The next decision to which reference in this connection has been made is N.K.Jain and others v. C.K.Shah and others reported in AIR 1991 SC 1289.

142. Again that was not a case where question of having necessary authority of law required for the purpose of taking action resulting in deprivation of property or imposition of tax etc was at issue. The question that specifically had arisen was a provision of levying penalty on an exempted establishment under Provident Funds and

Miscellaneous Provisions Act, 1952 was existing under Section 40(2A) of the Act where such exempted establishment has contravened any of the conditions subject to which exemption was granted. A question has arisen in the circumstances on such contravention of conditions exemption certificate has been cancelled, whether cancellation of such exemption amounted to levy of another penalty envisaged under Section 40(2A) so as to render Section 40(2A) inapplicable to such exempted establishment. The Court after referring to the principle enunciated by Lord Denning referred to above, and considering the meaning of penalty has stated categorically that while considering the scope of Section 40(2A) they have proceeded adhering to the language of the Section.

> "We are therefore satisfied that some of the conditions subject to which the exemption was granted have been violated. So this part of Section 14(2A) is satisfied. Now we shall see whether the cancellation under Section 17(4) is a penalty provided by or under the Act."

143. The court did not read existence of a provision providing consequence in the clause providing for breach itself. It looked for another provision for supporting the consequential punitive measure. It was only on finding that other provision authorises penalty, that the court upheld the action. It do support that there must exist a provision for inflicting consequence of penalty on the subject.

144. It was urged that in construing the provisions of a statute which is remedial in nature to suppress certain mischief at its object ought not to be placed at par with statutes with object of taking or deprivation of property. To put it other way the principles about tests satisfying the requirement of authority of law envisaged under Article 265 or 300A should not be made applicable as touchstone to remedial statute. Reliance was placed on Reserve Bank of India v. Peerless General Finance and Investment Co. Limited 1996 SEBI and Corporate Law Reports (Vol. VII) 126 (SC), wherein the court said Section 45K of the RBI Act is in the nature of an enabling provision. In the matter of enabling statutes the principle applicable is that if the Legislature enables something to be done if

gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purpose in view. On this premise it has been contended that in the like manner Section 11 and 11B of the Act are enabling provisions and must be construed to have conferred the power to make impugned order as necessary for the purpose of carrying out the purpose of the Act.

145. The contention does not stand the close scrutiny. No such distinction about Constitution's requisite of having a specific authority before a person can be deprived of his property on the ground of statute being for acquisition of property or for conferring police powers on State or of beneficial or remedial character has been made in the case. The issue about deprivation of property and fulfillment of requirement of authority of law under Article 300A were not at all the subject matter before the court. The case directly concerned the issuance of certain directions as additional regulatory measure, which were incidental to directions already issued and were to be effective having force of law and the question raised was about the ambit of provision of parent statute to have within its sweep authority for making such provision regulating the conduct of non banking companies as a matter of law, quite distinct from making an order as a result of enquiry bringing home desired consequences on a person, without there being an existing rule of discipline or Code of conduct having force of law authorising making of such order.

146. It will be necessary in the context to note some facts in the RBI's case. It related to challenge to validity of direction contained in paragraph 4A inserted in Residency Non Banking Companies (Reserve Bank) Directions 1987 by notification dated 19.4.1993 as under as ultravires the RBI Act.

> "4A.No residuary non-banking company shall take from any depositor/subscriber to any schemes run by the company, with or without his consent, any amounts towards processing or maintenance charges or any such charges, by whatever name called, for meeting its revenue expenditure.

Provided that a company may charge to a new depositor a one time initial sum no exceeding Rs.10 towards cost or expenses for issuing brochures/application form, servicing the depositor's account, etc."

147. The background of this controversy was that in order to regulate the activities of non banking companies in receiving deposits from public on large scale, RBI Act 1934 was amended by Act No.55 of 1963 by inserting Chapter 11B containing Sections 45H to 45Q. Section 45J of the Act empowers the Bank to regulate or prohibit issue of prospectus or advertisement by a non banking institutions soliciting deposits of money from the public. Section 45K enables the Bank to collect information from non banking institution as to deposits and give directions to such institution. Para 6 and 12 of the 1987 directions issued under these provisions were challenged before Supreme Court and repelled.

148. After Peerless II case upholding paragraph 6 and 12 of the 1987 directions, Peerless resorted to the course of splitting up the amounts received by it in such a way that it was not necessary for it to have complied with the directions contained in para 6 and 12 of the 1987 directions. It is to plug this loophole para 4A was inserted. The contention again was that the direction contained in para 4A here ultravires the Act and violative of Article 19(1)(g).

149. From the aforesaid it is abundantly clear that the Court was dealing with a set of directions issued by RBI having the force of law governing the conduct of non banking non financing institutions which were issued in exercise of power under Section 45. It was not a case of directly issuing an order bringing consequences on the alleged defaulter of some nature which did not already formed a part of operative statutory order. It may be noticed paragraph 4A prohibiting certain manipulative practices, which were affecting the existing direction, was required to be inserted by exercise of RBI's power to regulate the deposits from public by non banking institutions so as to make their conduct responsible for conforming to those set of directions. Those directions, were in the form of laying down the rule of discipline on which future conduct of object covered by it could be tested. Distinction has to borne in the case of taking some

measure by the SEBI in the sphere specified for it which may be treated as law on the one hand and making an order depriving a person of his property without first laying down such legal authority. A measure which could be treated as a positive law laying down a rule of discipline and providing also for consequences of breach of discipline which is incidental and necessary for its main purpose, can be treated within the authority, conferred on such authority for making such orders, rules, regulations, directions or orders having force of law. As seen above, the Supreme Court was dealing with a case where a direction issued by it inserting paragraph 4A, designed to have force of law, laying down the Code of conduct for the institutions covered by it was challenged on the ground of it being ultravires the Act. Whether laying of such a Code of conduct was within the authority of RBI under the Act or not, the court answered the question in affirmative by referring to Section 45K and 45L of the Act. Likewise if SEBI were to lay down a code of conduct to be applied by persons who could be dealt with by it under the Act, and also prescribes consequences of breach thereof, the question will be SEBI's competence to lay such code of conduct with all ancillary and necessary incident which is quite distinct from and the question whether the SEBI could act in a manner affecting rights of people in a manner without prescribing such provision which results in depriving any person of his property. While the former may be sustained with reference to Section 11, the latter cannot be.

150. In this context statement of law in State of Kerala vs. P.J.Joseph (AIR 1958 SC 296) may be usefully referred to, which brings out clearly the distinction.

151. In State of Kerala v. P.J.Joseph question arose about validity of demand of additional payment of 20 per cent on sale of liquor from licence in pursuance of an endorsement made by the Government on a reference made to it by the Board of Revenue. The Court held that the endorsement was not a statutory order passed by State in exercise of statutory power under the statute. It was nothing more than what is purported to be namely a departmental institution that exercise authorities might allow extra quota to wholesale licensees on payment of requisite commission. It also repelled the contention that order be treated as rule,

amending existing rule 7 under Cochin Abkari Act, by holding that even if it was possible to regard the endorsement made by Government on the reference made to it by the Board of Revenue, as a rule or notification prescribing the rate of duty if not having been published in accordance with requirement of Section 69 of the Act it cannot have the force of law. In view of these conclusions the court held that:

> "As an order it therefore, an executive order which had no authority to support it and therefore the imposition was illegal."

152. This clearly envisages unless an order though within the province of law making authority, is framed properly as legislative measure, it cannot furnish requisite authority of law to sustain the impost. In other words merely because it comes within the existing field of Legislative power of the authority, whether parent or subordinate, unless that power is actually exercised by framing law, is not sufficient to sustain the impost of tax, deprivation of property or appropriation of consolidated fund. A law must be in existence to which order can be referrable to for its support.

153. The learned counsel for the respondent placed reliance on following observation of Supreme Court in Delhi Development Authority vs. Skipper Construction Company (P) Limited AIR 1996 SC 2005 wherein the Court directed restitution of position arising out of fraud of DDA officers which action included forfeiture of their ill-gotten money and acquisition of assets through bribes.

> "The absence of statutory provision will not inhibit this Court while acting under the said Article from making appropriate orders for doing complete justice between the parties. The fiduciary relationship may not exist in the present case nor is it a case of a holder of public office, yet, it it is found that someone has acquired properties by defrauding the people and it it is found that the persons defrauded should be restored to the position in which they would have been but for the said fraud, the Court can make all necessary orders. This is what equity means and in India the Courts are not only Courts of law but also Courts of

equity."

154. However, one is unable to find any support for the plea of the learned counsel to read the provision of statute to include power to forfeit even if the same does not exist or to confer power on the statutory authority created under the Act or by other courts in India. The court clearly observed that provisions of forfeiture of property of those in office indulging in corrupt practice is needed to be made part of law. It said:

> "May we say in parenthesis that a law providing for forfeiture of properties acquired by holders of public office (including the offices/posts in the public sector corporations) by indulging in corrupt and illegal acts and deals, is a crying necessity in the present state of our society. The law must extend not only to as does SAFEMA properties acquired in the name of the holder of such office but also to properties held in the names of his spouse, children or other relatives and associates..... It is for the Parliament to act in this matter, if they really mean business."

155. These observations of the Court negates the learned counsel's contention that in the matter of conforming authority for depriving a person of his profits by impounding or forfeiture, the statute should be read in expansive field even if such power is not clearly spelt from the existing provision to overcome the requirement of Article 300A. The fact that Supreme Court exercised its plenary power of issuing directions to do complete justice inspite of absence of law under Article 142 does not detract from necessity of an existing authority of law made by Parliament before such authority can be vested in executive functionaries. The Court itself made clear that it is exercising its power under Article 142 and said that absence of statutory provision will not inhibit the court (Supreme Court) while acting under Article 142 from making appropriate orders for doing complete justice between the parties.

156. Reference to Attorney General for India vs. Amritlal Prajivandas reported in (1994) 5 SCC 54 in this connection was also made. That was a case in

which SAFEMA provided for forfeiture of illegal properties acquired in violation of law was provided by statute. Question was about the vires of such provision but not about action of forfeiture without statutory provision. It is one thing to say that appropriate legislative body can enact a particular provision or not then to say whether an act of an authority can be supported without there being any statutory provision, if such statutory provision is a condition precedent for exercise of such power.

157. While Constitution provides that no person shall be deprived of his property save by authority of law and as we have seen above the law in the context means positive statutory law, whether framed by the Legislature under its preliminary powers or by the Subordinate Legislature of being authorised to make such law, one thing must be accepted that existence of law must be antecedent to actual act of deprivation takes place, enabling the authority to take that action. Such a power cannot be exercised in the absence of preexisting authority or such a power cannot be deemed to exist merely on the ground that action taken by the authority can be related to the purposes of the Statute for which the power has been in fact exercised unless Statute under which power has been exercised, also authorises such action which has the effect of depriving a person of his property.

158. When we speak about the law under Article 300-A or under Article 265 or under Article 266(3), it means the statutory law or rules or code of conduct prescribed by the legislative process. Legislation itself signifies the act of giving or enacting laws, the function of the Legislature is to frame and enact laws or formulation of rules for the future, that is to say, in the first place, rules governing a particular course of conduct are framed and thereafter any conduct which is governed by the sphere of such rules is to be adjudged, whether it is valid or ultravires of the rules on the touch stone of those rules.

159. In Black's Law Dictionary Vth edition, the word legislative has been stated to mean making or giving laws pertaining to definition of law given or to the process of enactment of law. It also says actions which relates to subjects of Parliament or general character are legislative.

160. Legislative Act in the same book has been stated to mean `one which prescribes what the law shall be in future cases arising under it.'

161. So also legislation has been explained to mean the act of giving or enacting laws, the power to make laws; the act of legislating preparation and enactment of laws; formulation of the Rules for the future.

162. Law generally has been understood to mean a rule of action to which men are obliged to make their conduct conforming to.

163. In the context of issue at hand, where law has been interpreted to mean a positive or State made law in order to conform to that it must follow the customary form of law making and must be expressed as a binding rule of conduct. There is generally an established method of enactment of law and laws when enacted have also a distinct from. It may be by an act of Parliament or State Legislature, the rule or statutory order or bye-law, Regulations having the force of law.

164. Reference may be made to State of Gujarat v. Bundi Electric Supply reported in 1970 Raj 36 and 1980 Madras Law Journal page 617. In that way, the regulations framed in exercise of delegated authority which have the binding character and force of law fall in the definition of law because Regulations ordinarily means prescription of Rules for control of conduct, that means that Regulations may provide such a norm to which future conduct of subject must conform.

165. The conclusion that law for the purposes like one at hand must pre exist the taking of action referable to it is strengthened by the very nature of the necessary requirement of a mandate of State to be construed as law. I cannot do better than to reproduce what Justice Vivian Bose said in Harla v. State of Rajasthan reported in AIR 1951 SC 467:

> "We are of the opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge.

> Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

166. The fact that law is to be published and made known in someway, before it become operative to affect the subjects implies that before any action can be subjected to test of Code of conduct provided by law and be visited with consequence that may follow breach of such Code of conduct or law, Code of conduct which is required to be followed, and consequences that are to follow on its breach, both must be made known. This inhers in it specific provision for depriving one of its property by forfeiture or other penal measures. Unless law making such specific provision is made known, the law cannot be held to exist for sustaining such action.

167. Somewhat similar view was expressed by the Supreme Court again in Khemka and Co. (Agencies) Pvt. Ltd., vs. State of Maharashtra reported in AIR 1975 SC 1549:

> "The imposition of a pecuniary liability, which takes the form of a penalty or fine for a breach of a legal obligation cannot be relegated to the region of mere procedure and machinery, for the realisation of tax. It is more than that. Such liabilities must

> be created by clear, unambiguous, and express enactment. The language used should leave no serious doubts about its effect so that the persons who are to be subjected to such a liability for the infringement of law are not left in a State of uncertainty as to what their duties or liabilities are. This is an essential requirement of a good government of laws. It is implied in the constitutional mandate found in Article 265 of our Constitution: No tax shall be levied or collected except by authority of law: No tax shall be levied or collected except by authority of law".

168. This establishes in no uncertain terms that not only that pronouncing of law must precede the act referable to such authority of law and that law which results in depriving a person of his property by way of liability in the form of penalty must be created by clear, unambiguous and express enactment, there cannot be any room for inferring the existence of necessary authority of law by attributing inferential intention.

WHETHER REQUIRED AUTHORITY OF LAW EXIST

169. Viewed from aforesaid point of view, let us examine whether the provisions of the Act of 1992 or Regulations framed thereunder provides for any such power of depriving the person dealing at the Stock Exchange on the considerations which have crystalised in an actionable claim in favour of one of the parties on the ground of being unjust enrichment.

170. The Securities and Exchange Board of India (hereinafter referred to as `The Board') was established under Section 3 of the Securities and Exchange Board of India Act, 1992. The preamble reads to provide establishment of the Board to protect the interest of the investors in securities, to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto. Section 11 casts a duty on the Board to achieve aforesaid objectives by such measures as it thinks fit subject to provisions of this Act. Sub clause 2 provides that without prejudice to the generality of the foregoing

provisions, the measures referred to in subsection (1) may provide for various specified matters enumerated therein which includes under clause (e) `prohibiting fraudulent and unfair trade practices relating to securities markets'. Section 11B empowers the Board to issue such directions as may be appropriate in the interest of investors and securities and securities market, if after making or causing to be made an enquiry, it is satisfied that it is necessary in the interest of investors or orderly development of the securities market or to prevent the affairs of an intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to the interest of investors or securities market or to secure the proper management of any such intermediary or persons. The persons referred to in Section 12 are stock brokers, subbrokers, share transfer agents, banker to an issue, trustee of trust deed, registrar to an issue, merchant banner, under writer, portfolio manager, investment advisor and such intermediary which may be associated with the securities market. Section 29 confers authority on the Central Government by notification to make rules for carrying out the purposes of this Act and particular reference to the matters in respect of which rules can be framed have been referred to in Section 29(2). Section 30 empowers the Board to make regulations consistent with the Act and the Rules made there under to carry out the purposes of this Act. Apart from generality of the provisions enabling the Board to make Regulations, sub Section 2 of Section 30 also enumerates certain specified areas in respect of which Regulations may be framed by the Board. Section 31 requires every rule or every regulation made under the Act to be laid before each House of Parliament while it is in sessions for a period of 30 days which may be comprised in one session or in two in such successive sessions and if before the expiry of the session immediately following the session or the successive session as the case may be, both Houses agree in making modification in the Rule or Regulations or both Houses agree that Rules and Regulations should not be made the Rule or Regulation shall thereafter have effect only in such modified form or be of no effect as the case may be. Section 32 makes it specific that provision of this Act shall be in addition to and not in derogation of any provision of another law for the time being in force. Apart from aforesaid Chapter VI A of the Act specifically provides for penalties and adjudication

for contraventions of certain provisions of Act, Rules or Regulations and Section 24 declares contravention of Act Rules and Regulations as an offence punishable with imprisonment and fine. It is in the scheme of these provisions it has to be examined whether there exists authority of law for depriving a person like the petitioners to their right, to recover the amount which has crystalised into actionable claim as the result of completion of transactions of securities, whether by actual execution of contract through delivery of securities or by act of Stock Exchange in settling the transactions by inviting auction or closing out the transactions, under any provision of Act, Rules or Regulations.

171. The argument in the broadest sense is that Section 11 which cast a duty on the Board to achieve the objectives and purposes of the Act and for that purpose empowers the Board to adopt and take such measures as it think fit embraces within its fold in appropriate cases to forfeit the profit which it considers are result of a manipulated market, particularly in respect of those persons about whom it is satisfied that they are responsible for such manipulation, and the contention at its narrower point is two fold that in Regulation 12, there has been specific empowerment of depriving a person of his profits arising out of such manipulated market and even if it is not covered by Regulation 12, such power is to be read in provision of Section 11-B which empowers the Board to issue such directions as may be appropriate in the interest of the investors in securities and the securities market to any person which include any person associated with the securities market where the Board is satisfied after making or causing to be made an enquiry about the necessity of issuing such directions. In this context, it has also been urged that the Regulations framed under section 30 are a specie of subordinate legislation and have binding force as statute after the same are laid before the Parliament and have not been modified and not disapproved by the Parliament and if modified by parliament in its modified form.

172. It is contention of none of the parties that there is any specific provision whether under the Act, Rules or the Regulations for making of the order for impounding monies by the Board like the one which has been made in the present case. Thus in view of the requirement of specific authority of

law as laid in Wazirchand's case and reaffirmed in later decisions, the issue would have ended here. However, it was urged that this authority of law for depriving a person transacting at Stock Exchange of its profit for given case must be inferred from these provisions, by necessary intendment. Is it so?

173. Section 11(1) envisages a duty on the Board, on the one hand, to fulfil the objective for which the Act has been enacted and the authority, on the other hand, to take such measures which it deems necessary for the purposes of achieving such objectives. The authority of SEBI under Section 11 thus is to take measure.

174. What is meant by measure? According to Oxford England Dictionary word `measure' means `a plan or course of action intended to attain some object'. This, in the context of provision in question which casts a duty on the Board to achieve certain objectives and also confers authority to act in furtherance of achieving intended objectives is the most appropriate meaning that could be assigned to word `measure'. In Corpus Juris Secundum word `measure' has been assigned the meaning as `anything devised or done with a view to accomplishment of a purpose, a plan or course of action proposed or adopted by a government.

175. In the context the enabling provision empowering SEBI to take measure can only mean that it has authority to devise or adopt an action plan to achieve its objectives. Devising or adopting an action plan obviously has to precede before subsequent acts are required to conform to such action plan devised.

176. Thus, constituted the ambit of authority of Board under Section 11 is to make a plan or adopt a course of action for regulating securities market or safeguard interests of investors in securities. The action plan of the Board to achieve the objectives may be in the form of executive instructions, it may be by way of subordinate legislation or in the form of directions or order which the Board is otherwise specifically authorised to make under various provisions of the Act or rules framed thereunder or even if authorised by any other law for the time being in force as envisaged under Section 32 of the Act. However, before action in terms thereof is

taken in order to be a touchstone to which any actions of persons to be dealt with by the Board are to be tested and action of the Board to dealing with such persons can be tested. Such plan or course of action which the Board may adopt to achieve its object, shall obviously have to be delineated. Such plan or action or measure envisaged may be in the form of a legislative act or direction which may be issued on arising of such a situation having relation to the objectives of the Statute. Obviously, in the former case, if a plan or course of action has been chartered which can be said to have force of law, it must satisfy the test of being a valid law enforceable. In latter case, where action is guided subsequent to happening of the event to deal with a situation arising from such happening to be collated to the plan adopted by the Board, as a remedial act to repair the breach, or to create situation conducive to the plan. Former falls in the sphere of adopting legislative measure for achieving the objectives of the statute and the latter falls in the sphere of administrative actions to achieve the purposes of the Act. If the latter action results in depriving a person of his property, unless it is backed by proper legislative sanction, the action would fail. In the former case, adoption of legislative measure by the Board, if it is empowered to legislate on the subject, will not fall for want of authority to legislate.

177. This is so because apart from generality of provision, there is a specific provision empowering the Board to take appropriate measures for prohibiting fraudulent and unfair trade practices relating to securities market. Such specific empowerment would include power to take legislative measure, where necessary, providing for ancillary matters for achieving that object. This indicates no prohibition by itself is envisaged under Section 11 of any activity. Prohibition to indulge in fraudulent transaction or unfair trade practice will result from taking some action imposing prohibition of such acts. Consequence of breach of prohibition will naturally follow the measure of dictat of prohibition. Thus neither prohibition, in respect of certain sphere for which measures can be taken, nor power to visit with intended consequence of breach of prohibition could be inferred by necessary intendment under Section 11 de hors the actual measure taken or action plan laid for achieving the specific object under Section 11(2)(e).

178. Reference may usefully be made to meaning assigned to word `measure' in Words and Phrases Legally Defined, 2nd Edition, which says,

> `measures means legislative measure intended to receive the royal essence and have an effect as an Act of Parliament in accordance with the provisions of the Act (Church of England Assembly Powers Act, 1919)'

179. In this connection, it may also be noticed that Church of England Assembly Powers Act, 1919 empowered The National Assembly of the Church of England to take measures concerning the Church of England. The measure passed by the National Assembly of Church of England by itself was not a Statute, but if such a measure was laid before the Parliament and presented to the Queen in pursuance of the resolution of each House of Parliament, it had the force and effect of an Act of Parliament. It was also the case that the Parliament had no power to amend such measure passed by National Assembly of the Church. This distinction was clearly made in Halsbury's Law of England, IVth Edition, 44th Volume in Para 802 where it said that a general Synod. measure is not a Statute. However, if such a measure is laid before the Parliament and is then presented to the Queen in pursuance of the resolution of each House of Parliament, it has the force of law. It has force and effect of the Act of a Royal assent being given to it.

180. In 34th Volume Para 1226 of Halsbury's Law of England stated the proposition about power of General Synod of the Church of England to take measures as under :

> "1226. General Synod Measures. The General Synod of the Church of England may frame and pass legislative proposals, termed Measures, concerning the Church of England. A measure agreed to by the General Synod is submitted by its Legislative Committee to the Ecclesiastical Committee of members of both Houses whose duty it is to report to Parliament upon the nature and legal effect and expediency of the Measure. The report and the text of the Measure are laid before Parliament, and a resolution is submitted to

each House directing that the Measure, in the form laid before Parliament, be presented to Her Majesty. When this resolution has been passed by each House and the royal assent signified, the Measure has the force and effect of an Act of Parliament. Parliament has thus no power to amend a Measure, but either house, by declining to agree to the resolution, is able to effect its rejection."

181. Reference in this context may be made to Attorney General vs. Witts United Dairies Limited (1922) 127 LT 822. It was a case where the Food Controller, during war period, was empowered by the Defence of the Realm Regulations to make regulations or giving directions with respect to the production, manufacture, treatment, use, consumption, distribution, supply, sale or purchase other dealings in any articles as appears to him to be necessary or expedient. Finding there was disparity in prices milk in different areas, in order to equalise these prices, the defendant company was permitted to purchase milk within certain area on the condition of paying 2 pence per gallon to controller for this privilege. Company refused to pay, on the ground that in the purported exercise of power to regulate and issue orders for achieving the object as appears to the controller be necessary or expedient did not include the power to impose such burden. Agreeing with the plea of Food Controller that measure even adopted upon extreme difficulty of the situation to which the country found itself owing to war and importance of securing and maintaining vital supplies essential for life. Lord Buckmater, while hearing appeal by Attorney General, in House of Lord, dismissed the appeal by holding that statute has confined the duties of the food controller to regulating the supply and consumption of food and taking the necessary steps for maintaining proper supplies observed:

"The powers so given are no doubt very extensive and very drastic but they do not include the power to levying upon any man payment of money; which the Food Controller must receive as part of national fund can only apply under proper sanction for national purposes. However the character of this payment may be clothed .....the result in that the money so raised can only

be described as a tax the varying of which can never be imposed upon subjects of this country by anything except plain and direct statutory measure."

Lords Wrenbury express the same view in slightly different language when he opined:

"The Crown in my opinion cannot here succeed except by maintaining the proposition that where statutory authority has been given to executive to make regulations controlling acts to be done by Her Magesty's subjects or some of them may without express authority so to do demand and receive money as the price of exercising power of control in a particular way, such money to some public purpose to be determined by the Executive."

182. Thus it is apparent that House of Lord did not agree with the contention of Attorney General, that wide executive power to regulate and make any order it deem appropriate and expedient to achieve the objective include the authority to burden the subject with monetary liability without express provision of statute to that effect. The fact that the action has nexus to achieve the objective for which authority is conferred on Board, does not absolve the requirement of an express statutory authority in that regard, when it comes to deprive a person of his property. The view found its approval in Venkata Subbarao v. State of Andhra Pradesh reported in AIR 1965 SC 1773.

183. Here we may notice one of the contention of the learned counsel for the SEBI was that no element of punishment is involved in the directions of the Board. The direction only deprive the petitioner of windfall profit arising out of manipulated market and is not a measure of penalty. The plea is also raised to support the contention that for this reason no hearing was required to be given.

184. If the order has direct nexus with any act of petitioner to befell him with its consequences, it will undoubtedly be a penalty requiring specific provision of law providing for forfeiture or confiscation as noticed in the case of Wazir Chand (AIR 1954 SC 415) Bishambhar Dayal Chandramohan's case (AIR 1982 SC 33).

185. If the order is not punitive in character or does not amount to penalty, then there does not remain any basis at all for raising such demand, except to treat as tax.

186. In Venkat Subba Rao's case (supra) (AIR 1965 SC 1773) under orders issued by Andhra Pradesh State Government in exercise of its powers under Section 3 of Essential Supplies (Treasury Powers) Act, 1946, paddy and rice was to be procured by Government agents and distributed to authorised persons. Procuring agents were getting difference between purchase price and sale price. Government enhanced sale price which resulted in excess profit to procuring agents. The Government laid claim to excess profit, treating it to be a windfall to procuring agents to which they were not entitled to. There was no breach of any provision of the order on their part. The court held that if principle of relationship of Principal and Agent is accepted then the procuring agents were entitled to retain the difference as their remuneration. If the theory of principal agent was discarded, as suggested by the Andhra Pradesh Government. Ayyangar, J speaking for majority said:

> "Besides if there is no legal basis for these demands by Government, we consider that it is not possible to characterise them as anything else than a taxes. They were imposed compulsorily by executive and are sought to be collected by State by the exercise inter alia of coercive statutory powers, though these latter are vested in Government for very different purposes"

187. The ratio of the aforesaid decision comprehensively repels the contention of the Board to justify the order by treating it not a measure of penalty, as falling under the authority of Section 11 read with Section 11B of the Act.

188. From the tenor of orders and pleadings it is apparent that primary object of the orders in present case is to reach the funds generated as a result of close up/auction transaction by carrying them to Investor's Protection Fund. On specific query it was stated that as on that day no such Fund has been created or is existing which is administered by SEBI. That is to say action of the Board was clearly directed to object of getting

funds for the purpose of establishing a fund for the protection of investor's interest, which is one of the objects for it to fulfil. It betrays that action was not collated as ancillary to regulating stock market but primarily to get funds for its activity. That is in the nature of raising money. This amounts to levy of fees or tax. The Act does not authorise levy of fees on tax, for any purpose. The delegation of authority under parent statute does not get such power by necessary intendment, which is not even authorised by parent of statute.

189. It is to be seen that in its order dated 5.7.96 in Special Civil Application No. 2224 of 1996 the Board has ordered to impound the proceeds with Stock Exchange by directing that the auction proceeds and close out proceeds which has been withheld by the Stock Exchange, to the extent it represents difference between auction price/close out price and standard price be not given to offerers/buyers and should be impounded. The Exchange was directed to credit the monies impounded to its Investor Protection Fund. In Special Civil Application No. 5483 of 1996, the Board in its order dated 25.1.1996 has ordered simpliciter to transfer the monies collected in adherence to its earlier order dated October 30, 1995 to Investor Protection Fund of the concerned Stock Exchange.

190. Impounding has definite meaning in legal parlance. Literally translated impound means, as per Oxford Dictionary to take legal possession of or confiscate. Confiscate connotes appropriation to public treasury as penalty or to adjudge to be forfeited to State. Impounding as per Black's Law Dictionary means to seize and take into custody of law or court. The character of order impounding therefore cannot but be penal in character resulting in forfeiture of holder of property. Forfeiture, as per enunciation by Supreme Court in R.S.Joshi's case is penalty for non compliance of statutory provisions. Such consequence could follow only in persuance of specific provision.

191. Transfer to Investor's Fund simpliciter, without assigning it any character, will amount to expropriation by the Board of somebody's property for its own use. That obviously can be termed only as tax on profits which also needs specific authority of law for its levy and collection and cannot be left to inferences.

192. In this light if we examine the scheme of the Act in question, it is to be found that Section 11 empowers the Board to take such measures as it may deem fit to achieve the objective for fulfillment of which duty has been cast on it. The measures may be of legislative character as well as of administrative character. Subsection 2(e) specifically authorises the Board to take measures for prohibiting fraudulent and unfair trade practices. This provision unfolds the scheme that the Board can make a plan or provide for such prohibition. This necessarily implies that Board while prohibiting may have to define what are fraudulent and unfair trade practices vis-a-vis any security market. As an ancillary measure it may also provide for consequences of indulging in practices prohibited. It may be noticed that the Act itself has not provided for any such prohibition of fraudulent or unfair trade protection, nor has defined the same, but has left such measure to be taken by the Board. Hence, some positive act by the Board providing prohibition of such practices must precede before any action could be taken against any person for alleged crossing the prohibition lines. Only on breach of such prohibition by such person question would arise for determining whether the act of that person is in breach of such prohibitory measure and for taking a decision on what consequences to be visited on defaulter. Since prohibition itself is not part of main provision, ancillary authority conferring power to deprive a person of any property on acting against prohibitory measure, which is ancillary to man power cannot be inherently inferred in the enabling provision. Such provision can only follow the prescription of prohibiting measure. Obviously measure here refers to legislative measure in the sphere covered by Section 11(2)(e).

193. For the purpose of adopting measures of legislative character, Board has been conferred with power to frame Regulations under section 30 which in order to be effective, has to be placed before each House of Parliament during its session for a period of 30 days. Parliament has necessary power to modify or decline to agree with the same. In case the Parliament decides to modify the Regulation in its entirety or a part of it, the Regulations become effective in its modified form. If Parliament declines to pass it, it ceases to have any effect,

but it the Parliament does not interfere in either way, the Regulations continue to have force of law and are binding as Statute as per the provision of main Act. But unless the same are placed before Parliament and continuity remain before Parliament for requisite period, only then it acquires the force of law in case of no rejection has taken place during that period, whether in the same form or modified form as the case may be.

194. This view has been taken by this Court in M/s.Karnavati Fincap Ltd. and another vs. SEBI reported in 1996(2) GLH 241.

195. At best it can be said that Section 11 by itself does not confer authority of depriving of a person of his property merely by issuing administrative instructions, but it authorises the Board to frame necessary Regulations in the manner prescribed under the Act, which may have the force of law, furnishing necessary authority for the purpose. But unless that is done, the Board cannot have recourse to issue administrative instructions nor in its capacity as a quasi judicial authority holding an enquiry, can make an order of depriving a person of his property which it thinks have not been obtained through fair practice. Deprivation of property through Administrative action or adjudicating order must conform to existing law on the touch stone of which alone such action can be sustained.

196. It was also contended by Mr. Shelat learned counsel for the respondent board that the fact that Board is authorised to frame regulations, does not oblige the Board to frame regulations. It is mere enabling provision. It can take appropriate measures even without framing regulations, which it is empowered to take under the Act and that by framing certain regulations, ambience of its power generally to take measures to fulfil its objectives are not exhausted. Hence even if the impugned orders do not fall within the Regulations of 1995, the same do not become beyond its authority to take measures under Section 11. As already discussed the power to take measures can be considered akin to executive power of State to do and act in all the fields to which legislative power of the State or Union, as the case may be extends.

197. In such cases, the executive authority

extends to entire field not covered by statutory provisions. However, that is subject to one inhibition. If doing of certain act or exercise of certain power in particular field is required by constitutional provision to be sanctioned by legislative process, the exercise of authority in that field can only be subject to existence of such legislative sanction and cannot be traced to its wide powers to act in the entire field of State authority left uncovered by legislative enactments. Hence, contentions of Mr. Shelat cannot be accepted in abstract, where the question is in the context of deprivation of property of a person, which under Constitution can only be sustained if authorised by law, law in the context means positive statutory law. Therefore unless the power to make any order or issue direction which results in depriving a person of his property, is traceable to some specific provision of law, the same cannot be upheld.

198. It may further be pertinent to notice if conferment of such enabling powers to take appropriate measure on authority entrusted with the duty to achieve objective in respect of which law could be framed by itself were to satisfy the requirement of authority of law needed under Article 31 or now under Article 300A, executive power on the Union of India or the State as the case may be, coexisting and coextensive with the legislative power of the Parliament and the State Legislature envisaged under Article 73 and 162 respectively would not have fallen short of the authority of law required under Article 31 or for that matter under Article 300-A enabling the State to deprive a person of his property for want of appropriate law having been brought into existence by legislative process, as per principles enunciated by their Lordships of Supreme Court in State of Madhya Pradesh v. Bharat Singh reported in AIR 1967 SC 1170 (supra) and Bishambar Dayal Chandramohan v. State of Uttar Pradesh reported (1982) 1 SCC 39 referred to above.

199. Therefore, where power has been conferred on the Board to adopt such plan or course of action, it can also be said to have been conferred with necessary authority as a subordinate Legislature to frame Regulations for specific purpose apart from generality of the provisions, unless such law has been framed either by parent law making agency or by subordinate authority in accordance with the

provision of Statute under which power has been conferred, Section 11 of the Act by itself falls short of the authority of law needed for sustaining the orders unless it can be sustained under some other provisions.

200. Mr. Shelat placed reliance on The Adoni Cotton Mills Ltd. etc. etc. v. The Andhra Pradesh State Electricity Board and others reported in AIR 1976 SC 2414 for the proposition that power to take measures include power to enforce breach of measures. The framing of regulation for such measures as desired to be taken by the Board is not necessary requirement for action taken to enforce the breach of measure adopted by the Board. The issue had arisen in connection with the power of Electricity Board to ration the supply of electricity the action of the Board in fixing higher rates for consumption of excess of ration quota consumed by a consumer which was challenged. The Supreme Court was called upon to decide the issue in the context of the contention that the Board had no power under Section 49 of the Act of 1948 either to impose rationing and introduce the different categories of rationing without framing Regulations. It was in that context, the Court had observed that the recognition of the fact that the Board can introduce rationing amounts to concession that Board has power to enforce rationing and to enunciate the principles for determining the scheme of such rationing. and the source of power to introduce rationing flew from the Act itself. For exercise of that power framing of Regulation was not necessary. It may be noticed that when power to rationing was given under the statute and power to frame Regulations was also given, the question was whether the incidental power could be exercised only by framing a Regulation. The court negatived this contention and held it is manifest that if the power existed it must be exercised according to valid principles consistent with the provisions of the Act and the language of Section 49 of the Act showed that the power was exercised without making any Regulation. As discussed above, the question was not about absence of power but the manner of exercise of power according to the provisions of the Act. Prescribing higher rate for consumption of excess quota on introduction of rationing, was considered to be part of the existing power. Power to impose ration was an executive policy decision of law to distribute existing supply equitably and

prescribing price of supply of electric supply. It was a case of recovery of a particular price in exchange of commodity supplied. In a given case on certain conditions existing higher or lower rates may be charged for supply of commodity. Objective behind prescribing higher rate was to enforce that the order of rationing is properly complied with by the consumers. Decision neither enunciates a principle that an act can be permitted in the name of enforcement of the objective of the Act itself, without there being any authority, for taking such action within the Act. Secondly, it inhibited the power should be exercised on valid principles which are other wise applicable. That is to say a power could be exercised to enforce the rationing only within the limits prescribed by the act or other constitutional limits. It was not a case at all referable to exercise of authority which resulted in depriving of a person of his property which under the Constitutional scheme requires an authority of law specific in character. On the contrary decision supports the view that if regulations in pursuance of that power has been framed in a particular field, the, the Board must act only in accordance with Regulations. The Court said:

> "If regulations were made, such regulations would have to be in conformity with Section 49(4) of the 1948 Act and in the exercise of its power the Board would have to abide by regulations."

That is to say on formation of Regulations in the field, it could not fall back on its untrammeled power.

201. For the reasons aforesaid, I am of the opinion that the decision relied on by the learned counsel in this context in Adoni Cotton Mills (supra), Ahmedabad Kelavani Trust v. State of Gujarat and ors. reported in 19(1) GLR 671 and AIR 1971 Gujarat 62 do not carry further the contention of the learned counsel.

202. Section 11-B to which reference has been made closely read, indicate that it is in the nature of issuing command to persons referred in the provision. If as a result of an enquiry, the Board is satisfied about the necessity of issuing such direction for the twin purpose viz., if the same is considered to be in the interest of investors in the

securities and the orderly development of securities market. Obviously it is not a power in the nature of adjudication by way of imposing penalty or bringing civil consequences to an affected party as a result of adverse finding in an enquiry in particular, but for commanding a person to do certain act or to fore bear from doing such an act, such commands for the purposes of furthering the interest of investors in the securities in general or furthering the interest of the orderly development of securities market or for preventing the affairs of any intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to the investors in the securities market or to secure a proper management of such intermediary or persons. As such, Section 11-B does not envisage the adjudication and making an order adverse to a person having a casual connection between the finding recorded against that person and consequent to be visited upon that person. For that, under the scheme of the Statute, separate provision have been made for imposing penalties and visiting the concerned person with punishment of imprisonment and fine by making such an act as an offence punishable with imprisonment and fine after appropriate trial.

203. Chapter VI-A provides for penalties and adjudication. Section 24 makes contravention or attempt to contravene or abetment to contravene the provisions of the Act or to any rules or regulations made thereunder as an offence punishable with imprisonment for a term which may extend to one year or with fine or both, which are to be tried by ordinary courts not inferior to Metropolitan Magistrate or Judicial Magistrate, Ist Class and cognisance of which is not taken except on the complaint made by the Board under Section 26. Thus, while action against the person involved in contravention of the Regulations, rules or provisions of the Act, is to be dealt with separately under the provisions of authorising levy of penalty or imposing punishment, direction of such a nature which has a direct nexus and casual connection between the act of the person alleged to be in contravention of the Act, Rules or Regulations made thereunder vis-a-vis his connection with any such act cannot be part of the scheme of issuing direction under section 11-B of the Act.

204. Learned counsel for the respondents laid

emphasis on the observations of Krishna Iyer, J in R.S.Joshi v. Ajit Mills Ltd reported in AIR 1977 SC 2279:

> "In a developing country, there is sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality."

205. It may be noticed that it was a case where forfeiture of the tax recovered by a dealer which was not leviable was provided in the statute. The question was about vires of statute on the ground it being beyond the scope of legislative power under Entry 54 of II list of Seventh Schedule of the Constitution. The court construed the provision of `forfeiture' to be penalty and not a civil liability to pay tax. When forfeiture was treated as a penalty for committing breach of taxing statute. Such provision for penalty were held to be within the scope of power to levy and collect tax on principle that power to legislate for levy and collect tax include power to make all incidental and ancillary provision to make the levy effective. It was not a case where the order of forfeiture was made by taxing authorities without any specific provision but was supported on the anvil of substantive power to tax itself to include power to do all acts which are incidental and ancillary for levy and collection of tax.

206. The context in which the power to issue directions have been conferred on the Board under Section 11B to any person or class of persons referred to in Section 12 or persons associated with the Securities Market or to any company in respect of matters specified in Section 11A further goes to show that while Section 11 authorises, empowers and enables the Board to lay down whether an action plan to be adopted for the various purposes whether in the form of guidelines by way of executive instructions or regulations by way of legislative measures by itself or by incorporating such measures in rules through Central Government in exercise of its power to frame rules, Section 11B empowers the Board to issue such guidelines for the purposes, of regulating conduct of the persons named in Section

11B with reference to its satisfactions about the matters referred therein, on the basis of an enquiry which has been conducted by itself or which it has caused to be conducted. In other words it can be said while Section 11 operates in the field of laying down general regulatory measures as a matter of policy Section 11B operates in the field of prescribing specified code of conduct in relation to specified person or clause of person referred to in Section 11 or associated with the securities market or to any company in respect of matters specified in Section 11A as the case may be referable to its finding in enquiry. That is to say it can direct such persons to do or not to do certain acts in a particular manner. But certainly power to impose penalties or punishments as a result of such enquiry without there being any specification to the nature of penalties or punishments that can be visited cannot be inferred.

207. In this connection it would be also relevant to notice that Section 11B is not couched in a normal manner of conferring adjudicatory power of finding a person guilty or adjudicating upon the rights of person and make consequential orders as a result of such adjudication on the person concerned de hors the provisions governing such impositions of penalties or bringing out certain consequences specified by law. The very fact that directions could be issued not only to persons but also to class of persons and with respect to specified matter in respect of the company rules out the directions in of the nature of imposing penalty or a power to forfeit any amount. The term used is not to make orders in respect of person found guilty of a breach of regulation, rule or law which is well known terminology in the field of prescribing consequences to be visited with in case of breach of law. But the term used is `issue such directions'. The functional object of issuing directions is to issue guidance for the purpose of actions to be taken by the persons to whom directions are made or forbearance for doing certain acts to whom such directions are aimed.

208. Term `directions' denotes issuance of instructions to be followed by the persons who are subjected to such direction. The New Shorter Oxford Dictionary gives the meaning of direction as (i) action or function of directing guidance, instruction , management; (ii) instruction of what

to do, how to proceed or where to go.

209. The Oxford English Dictionary Vol. III also defines expression `direction' as guidance, conduct; of instruction how to proceed or act right; authoritative guidance, instruction.

210. In Black's Law Dictionary, the meaning assigned to word `direction' is as that which is imposed by directing; a guiding or authoritative instruction order or command.

211. In view of the above, it cannot be said that Section 11 by itself or Section 11B by itself or both read together furnish specific authority of law needed before a person could be deprived of his right to recover the sale price of scrip sold by him which has been recovered and reached the Stock Exchange, in terms of Article 300A, though it can be said that by adopting legislative method which may result in coming into force of a regulation or force of law, such a measure may be supportable by the SEBI on the anvil of its power to take measures for achieving the objects stated in Section 11 if the same can be treated as ancillary and incidental to achieve the main objective and are otherwise within other constitutional limits.

212. The next question that arises is whether the Regulations of 1995 of the SEBI provide for such ancillary measure. It has been pointed out by the learned counsel for the respondent that Regulations 11 and 12 read together confer such specific authority of depriving the person of consideration of the completed transactions. For the ready reference Regulation 11 and 12 are quoted below:

> 11. "Power of the Board to issue directions. The Board may after consideration of the report referred to in Regulation 10, and after giving a reasonable opportunity of hearing to the person concerned, issue directions for ensuring due compliance with the provisions of the Act, Rules and Regulations may thereunder, for the purposes specified in Regulation 12.
>
> 12. Purpose of directions - The purposes for which directions under Regulation 11 may be issued are the following, namely -

(a). directing the person concerned not to deal in securities in any particular manner;

(b). requiring the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any particular manner;

(c). prescribing the person concerned from disposing of any of the securities acquired in contravention of these regulations;

(d) directing a person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may deem fit, for restoring the status quo ante."

213. For the present purposes, it is to be examined whether authority to make an order of the nature with which we are concerned can be spelt out. Regulation 11 empowers the Board to issue directions for ensuring due compliance of the Act, Rules and Regulations made thereunder. It further inhibits the ambit of scope of directions which could be issued in exercise of power in Regulation 11 by prescribing that such directions can be issued for the purpose specified in Regulation 12. If the word, `purposes' to be used in its ordinary sense as the object for which directives can be issued, then, the only object discernible from the entire reading of Regulation 12 is for restoring the status quo ante; because rest of the entire provision reflects the nature of directions that can be issued to any person who is concerned with compliance of any provisions of the Act, Rules or Regulations as a result of finding in the enquiry. The Regulations thus directly deal with the person, who is found to be concerned with non compliance of the Act, Rules or Regulations to be dealt with by the Board for the purposes of ensuring due compliance with the provisions of the Act, Rules and Regulations as a result of enquiry and to whom specific type of directions can be issued for the purposes of securing the compliance. One way of reading clause 12 is to read for restoring the status quo ante with each of class as a purpose for which direction can

be issued. Another way of reading the provision is to limit the condition of issuing directions for the purpose of restoring status quo ante only to sub clause (d) and other sub clauses of Regulation 12 to operate independently. We shall examine from both the points of view.

214. At the first instance it was urged that clause (a) of Regulation 12 empowers issuing of directing of a person not to deal in security in any particular manner which may include power not to deal in securities above a particular price and therefore it must be deemed that when petitioner was paid a part of the consideration received by the Stock Exchange it was a direction to the petitioner not to sell his securities above that price. As a corollary of this argument, it was further contended that if contention to this extent is acceptable then what happened to excess price received by the Stock Exchange is no concern of the petitioner and therefore issue of direction to pay the petitioner a part of the price received by the Stock Exchange should be deemed to be governed by clause (a) and rest of it namely impounding of the excess price received by the Stock Exchange to be invested in the investors protection fund is nobody's concerned least of it of the petitioner.

215. In the background of facts noticed above this contention in my opinion is not well founded.

216. Firstly clause (a) read in isolation independent of the purpose of restoring status quo ante only refers to issuing directions in respect of dealing in securities subsequent to the issuance of directions and not before. Here, we are concerned with a case of making an order in respect of a transaction that has been completed even before any directives of the Board were received by the Stock Exchange, in respect of the dealings in securities. More particularly, about the transactions of inviting shares to be offered at auction. Therefore, the directions that could be issued under clause (a) cannot be relatable to transactions already completed.

217. Secondly, clause (a) only provides issuing general prohibitory directions in respect of dealing in securities by a person concerned. Directions to deal in a particular security in any particular manner is not envisaged under clause (a) as will be

apparent from the provisions of clause (c) and clause (d) which deals with issuing directions in respect of specific securities, namely securities acquired in contravention of the Regulations.

218. Moreover, even assuming that clause (a) permits a person to be directed to offer his securities in the Stock market at a particular rate, then, too it can relate only to carry out such transaction of securities at that rate, it cannot take within its fold directions to complete the transactions in accordance with the Stock Exchange regulation at existing market rate or market situation and then to direct the person entitled to such amount to be paid a part of amount only and impound the balance. The very fact that the balance price is to be impounded inhers into it that the transaction as carried out stands valid requiring passing of the stipulated consideration in accordance with the transaction and Stock Exchange regulations. Once that stage has reached the seller becomes entitled to the sale proceeds and thereafter directing him to take part of the consideration and retaining part of it by the Board defies the logic of contention of the respondents that it is the manner in which the person concerned has been directed to deal in securities as it would directly amount to selling of the scrips at price `A' and then split it between the seller and the Board; whether by way of imposing penalty on the seller or sharing the proceeds earned by him. In either way, such a direction cannot be a direction for the concern to deal in securities in any particular manner, but is a clear case of sharing consideration, or profit. Therefore the contention that clause (a) spells the authority of law for issuing the directions of the nature with which we are concerned cannot be accepted.

219. It was strenuously urged that at any rate it is governed by clause (d) which authorise the Board to direct the person concerned to dispose of any such securities acquired in contravention of these regulations in such manner as the Board may deem fit. This provision in its clear term applies only to the securities acquired in contravention of the regulations. In respect of securities acquired by a person concerned, he can be directed to dispose of it in a manner so as to restore status quo ante. The directives envisaged under clause (d) cannot go beyond these two limits. This also clearly envisages that pre condition of this are as a result

of contravention of any provisions of the Act, Rules or Regulations the person concerned has acquired some securities.

220. The person concerned only in that event can be directed to dispose of those securities in a particular manner, and that manner of disposal under the directions of the Board must be aimed at restoring status quo ante in respect of those securities. Obviously when the acquisition of securities and its disposal of such securities as per the directions to restore status quo is the basic requirement of clause (d), one cannot accept the contention of Mr. Raval that the securities here must mean to include proceeds of securities. Securities have been defined to mean under clause 2(1)(b) as securities defined under Section 2 of the Securities (Contracts Regulation) Act, 1956. Under Section 2 of the Securities (Contracts Regulation) Act, 1956 securities has been defined to include shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of like nature of any incorporated company or other body corporate, government securities and such other organizations as may be declared by the Central Government to be securities and rights or interest in securities. Therefore it is not possible to accept the contention of the learned counsel for the respondents that authority to issue directions to the person concerned to deal in securities acquired by contravention of the regulations can be referable to proceeds of securities. It may be noticed, that rights or interests in securities are to be included in the definition of securities. Once the securities are sold and proceeds are recovered, the recipients becomes the acquirer of proceeds and he loses all rights, interests in the securities which have been sold by him and delivered to the parties. The rights or interests in such securities vests in the transferee and not in the transferer whose only right or interest that survive as a result of sale transaction is to receive the consideration and not the securities.

221. Moreover the regulation envisages direction to `deal in' the securities concern. The term `deal in' indicates to a commodity that may be subject to dealing in Stock Exchange in the context of whole scheme. It cannot be said that proceeds of scrips is commodity which can be dealt with by a person as security at Stock Exchange. Therefore on the plain

reading of the provision and also in the context of the facts and controversies raised before me it is not possible to accede to the contention of the learned counsel for the respondents that under clause (d) the Board could issue directives in respect of consideration of securities arising out of a completed transaction, by treating the proceeds of a completed transaction as `security' for the purpose of clause (d).

222. Assuming for the sake of argument even if the sale proceeds could be dealt with under clause (d) the same can only be for the purpose of restoring status quo ante and not for the purposes of visiting the contravener with a penalty by forfeiting his rights in such proceeds right to which has vested in him. Such direction cannot be considered to be a direction to deal with proceeds by the person concerned but amounts to exaction of money by the Board. Direction to deal with envisage something to be done by person concerned with the subject of direction to bring status quo ante but cannot be an authority to exact money for itself. That is not a dealing with proceeds by person concerned.

223. I need not dwell much on the clauses (b), or (c) of Regulation 12 inasmuch as neither it is the case of any of the learned counsel for the respondents nor it can be that the impugned directions could be covered under clause (b) and clause (c). Clause (b) is applicable to the officers or other employees or representatives of the person concerned in clause (a) about whom a person concerned may be required to issue directions to them to refrain from dealing in securities in any particular manner and clause (c) relates to prohibiting the person concerned from disposing of any of the securities acquired in contravention of these regulations at all. Obviously, the two provisions have nothing to do with the authority of the Board in issuing directions to impound the sale proceeds of a completed transaction.

224. In this connection it may also be pertinent to notice Regulation 13 which provide for penal consequences in the case of breach of regulations. It specifically provides that in the circumstances, specified under Regulation 11 the Board without prejudice to its power under Regulation 12 initiate action for suspension or cancellation of

registration of an intermediary holding a certificate of registration under Section 12 of the Act. If the power to impose penalty was generally included which is ancillary or incidental to the attainment of main objective, it would not have necessitated specific provision for suspending or cancelling the registration of the intermediary.

225. It may also be noticed that if the condition for restoring the status quo ante is applicable to all the clauses (a), (b), (c) and (d) without determining the issue, in that event the only directives in any case which can be issued must have relation to restoration of status quo ante. In a power to issue directives to restore status quo ante there cannot be any room for forfeiture of the amounts received by the Stock Exchange to be utilised at the behest of the Board as that cannot be a directive for restoring status quo ante. That can only be in the nature of curtailing right of the someone. If as a result of directions certain transactions can be cancelled or held to be void, the consideration recoverable under the directives would be nil and there will be nothing left for the Board to impound. If the transactions are directed to be completed at a particular price, then the transaction would be completed at that price crystallizing the rights of the two parties at which the transfer of shares had taken place, and there will be no occasion for recovery of additional consideration which could be available for impounding. The question can only arise in a case of completed transaction and proceeding have reached some one's hands. Thereafter if the impounding of any sum is to be made, in the event such impounding would be of the property of person concerned who is entitled to such consideration. It would assume the character of penalty, if not a tax on profit therefore, in no circumstances, the authority to impound full or part of consideration received under a completed transaction which cannot but be by way of penalty by forfeiture or exaction of profits is authorised under any of the regulations referred to by the respondents.

226. Considering the act of impounding as a causal consequence of any breach of regulation the question may be viewed from yet another angle.

227. The statute itself has provided for penalties and transaction, for committing breach of

the regulations. Section 24 makes contraventions or attempt to contravening the provisions of the Act, Rules or Regulations as offence punishable with imprisonment and with fine and as provided under Chapter IV-A penalties for various contraventions of the Act, Rules or Regulations. This makes it abundantly clear that so far as exercise of providing for incidental matters in achieving the objectives of the Act through the levy of penalty and imposing punishments for breaches of provision of Act, Rules and Regulations the Legislature itself has occupied the field by specifically providing for specific penalties and punishments for breach of Act, Rules or Regulations wherever it felt necessary. Therefore, power to impose penalty or punishment for breach of Regulation cannot be considered to be part of powers of the Board to take measures as it thinks fit for achieving its object. It may be noticed that even power of framing Regulations and taking legislative measures are also subject to the provisions of the Act and Rules, therefore in the occupied field of legislation by the statute itself or the Rules, the Board's authority to frame Regulations are also restricted.

228. Assuming it to be that to the extent specific penalties have not been provided for breaches specific of Regulations, the field of Legislation is unoccupied and as a ancillary measure, the Board could provide for levy of penalty as distinct from punishment for an offence than too without making specific provision for levy of such penalty for the breach of regulation specific itself; it cannot be said that merely because power has been conferred on the Board to take appropriate measures, without taking appropriate measure to authorise such action of levy of penalty, the action of the Board could be sustained as authorised by law within the meaning of Article 300-A when the action of the Board results in depriving a person of his property. As discussed above, authority of law required for sustaining the deprivation of a person of his property so as to be valid it must be an authority of law made through some legislative process, or so to say, of a positive law, within the scope of legislative competence of law making authority.

229. It may be viewed from yet another point of view. The parent Act had provided for consequences of breach of any regulation, framed under the Act as

an offence punishable under Section 24. It also provided for penalties for breaches of certain Regulations under Chapter IV-A. In exercise of its powers, particularly with reference to Section 11(2)(e), it has particularly framed Regulations of 1995 in the field of providing for prohibition of fraudulent and unfair trade practices. These regulations also provided for certain consequences to flow to person concerned who are found to be concerned with fraud or unfair trade practices as a result of enquiry held under Regulation 8. Therefore, the field of providing consequences of breach of Regulation particularly prohibiting fraudulent and unfair trade practices is occupied. In that event as per the principle enunciated in AIR 1976 SC 1152 which lays down that `if Regulations were made such regulations would have to be in conformity with Section 49(4) of the 1948 Act and in exercise of its power the Board would have to abide by regulation'. Exercise of executive power within the province of administrative discretion of the authority extends only to the extent the field is not occupied by statutory provision is well established by decisions of Supreme Court in Sant Ram Sharma v. State of Rajasthan and others reported in AIR 1967 SC 1910 and State of Haryana v. Shamsher Jang Shukla reported in AIR 1972 SC 1546. On this view of the issue also the Board is not entitled to act beyond the sphere circumscribed by the provisions of Regulations, 1995 in the matters connected therewith.

230. It was also urged in the alternate that the impounding of such amount is not by way of penalty or punishment, but a measure to stabilise the market condition by depriving the person concern of his profit, which the SEBI considers to be unduly high due to abnormal market condition, to give a message to dealers to refrain from operating with abnormal market condition. This according to Board's counsel need not be in respect of any person, concerned with prohibited practices but irrespective of that.

231. If the action of depriving a person of his consideration that has arisen out of transactions at Stock exchange by directing the Stock Exchange to retain the amount collected by it is not referable to imposition of penalty or punishment incidental to committing breach of the regulation, it partakes the character of a tax impinging on his profit or an act regulating the limits of profit that can be earned

at Stock Exchange. It is not anybody's case, that Board has been authorised to make any order or take any measure by way of levying any tax, on any person with whom it is authorised to deal with, or to regulate the limits of profits that can be carried out at Stock Exchange. Nor does any part of regulation put a restriction on earnings made by a person on existing or his estimated market trends and conditions.

232. It may also be noticed in this context, that regulations referred to above also primarily authorise the Board if it is satisfied after an enquiry and after affording an opportunity to the person concerned that a person has acted in breach of Regulations by dealing in the manner which can be considered as a fraudulent or adoption of unfair trade practices. The authority conferred on the Board is to issue directions to restore status quo in respect of the transactions which have been conducted fraudulently or adopting unfair trade practices, and to restrict the person concerned to deal in securities in any particular manner, but it neither authorises imposition of any penalty for breach of such regulation nor authorises SEBI to retain the amounts recovered by the Stock Exchange as a result of completion of transactions which have become actionable claims in the hands of offerers, for the purposes of its user at the direction of SEBI. It is also clear that action under regulation does not reach any person who is not person concerned with the alleged irregularities. Therefore it is difficult to hold that there exists an authority of law whether under Regulations or under the Act in favour of the Board to retain the amount of completed transactions in accordance with the prevalent Stock Exchange Practices and its Bye laws which have been received by the Stock Exchange for the purposes of third parties.

233. The order in Special Civil Application No. 2224 of 1996 concedes that the security offered at auction had some value and holder thereof is entitled to its price. What is found objectionable is that offerers should not get undue or ill gotten profits arising out of rigged/manipulated price. Reach of the order, is clearly intended to curb the extent of profits that are earned by a party to transaction. Likewise in Special Civil Application No. 5483 of 1996 though order of Board does not say anything like that, the Central Government in its

appellate order speaks that while in the normal course the purpose of investment is to make financial gains, when the conditions prevalent are abnormal the denial of windfall profits can hardly be described as denial of a right because such gains can only be made at the expense of another. It is SEBI's obligation to ensure that its dispensation are equitable between the various parties on market ... In reply affidavit also in para 10:4 it has been unequivocally stated that the direction only deprive the windfall profit arising out of manipulated market and is not a measure of penalty.

234. The orders and averments are clearly indicative that they are directed to deprive the petitioners of the profit, which are considered abnormal, though right to make gains at market is granted. Thus inspite of all contentions to contrary it must be accepted that the action was intended to deprive the petitioners of its profit, which was considered to be excessive windfall or abnormal. The object of Act, anywhere is neither stated to be nor is discernible from any provision that the Board is empowered to regulate the prices of scrips or is authorised to take measures to regulate the market for the purpose of restricting the limits of profits that can be earned. Earning a windfall is not prohibited under any law. Even a treasure finder is entitled to retain the same or share with the occupier of site from where it is recovered for himself. If the State wants to acquire the same, it has to acquire the same as per the provisions of Treasure Trove Act. The prizes earned by any person from lotteries cannot be said to be ill gotten to be forfeited or impugned, though the same are windfall. When the State wants to share such windfall profits it had resorted to statutory provisions within its legislative field by enacting appropriate taxing provisions. Windfall profits are as much amenable to taxing statutes as earned profits. The statute, in my opinion , does not take within its sweep the measures, which are intended to regulate prices for limiting profits that can be earned by Trading activity. This is not to say that Board cannot take measures to regulate market to ensure fairness in trading activity and to keep it free from fraudulent or manipulative practices and to provide for penal consequences as ancillary measure, as distinct from measure primarily to curb profits. Though in either case there will be deprivation of profits, the one will

be in the realm of ancillary and incidental to achieve the object of regulatory measure under a statute the other will be collated to levy of tax. Former may be justified exercise of legislative authority delegated under the Act the latter may not be except as a levy of tax authorised by law under appropriate entry, by parent legislature.

235. In Bombay Dyeing and Manufacturing Co. Limited v. State of Bombay reported in AIR 1958 SC 328, the court held the provision of Bombay Labour Welfare Fund Act for constitution of a Labour Welfare Fund and which provided notwithstanding anything contained in any other law for time being in force the sum specified in subsection (2) of Section 3 to be invalid, nor protected under Article 31. It was so because that amounted to not mere deprivation of property by authority of law, but amounted to tax or fee. So also in State of Madhya Pradesh v. Ranojirao Shinde reported in AIR 1968 SC 1053, the court drew the distinction between deprivation of property and taxing powers and held that power under Article 31 cannot be utilised for enriching the coffers of the State.

236. The purpose of the aforesaid discussion about board's authority to take legislative measures is confined to question whether there exist authority of law for the Board to make the order like the impugned order which result in deprivation of property and not to declare on validity or otherwise of any law that may be made in future. That will have to be tested on its own strength within the constitutional precincts, as and when occasion for the same may arise.

237. As a result of aforesaid discussion, it must be held that the Board had no authority under any provisions of the Act, Rules or Regulations under which it functions to impound whole or any part of consideration of a completed transaction to which the person entitled to receive consideration have acquired right to claim.

NATURAL JUSTICE

238. The orders have been challenged on the ground of having been made in breach of principles of natural justice. Impugned orders in both cases

under consideration have been undisputedly made without affording an opportunity of hearing to the petitioners whose rights have been affected. While the order under challenge in Special Civil Application No.2224 of 1996 itself speaks of the futility of giving hearing but tries to soften the import of keeping principles of natural justice at bay by proposing to afford a post decisional hearing to the person aggrieved against the order of impounding of the proceeds in question, the impugned order of the Board in Special Civil Application No. 5483 of 1996 simply makes an order of impounding of all money received at closing of the transactions in respect of RIL shares on the ground of manipulated market conditions. It has been clearly averred in reply affidavit that order is not by way of penalty but for restoring the market condition.

239. The Central Government while hearing appeal has found it unnecessary to afford an opportunity of hearing at all in respect of the impugned order, because in its opinion it did not at all affect the petitioner adversely to raise any grievance about it. Since I have reached conclusion that the orders do affect petitioners adversely, ordinarily this lack of opportunity to the persons affected by order would alone be sufficient to vitiate the order and render them void ab initio unless adherence to principles of natural justice can be deemed to have been excluded by statutory provisions expressly or by necessary implication. In the instant case, there is no plea, nor it can be that there is any such exclusion of applying the principles of natural justice before making orders affecting the rights of parties. On the contrary it will be seen presently that there is express mandate in the parent statute itself as well as in the regulations for affording an opportunity of hearing before orders can be made. However, two alternative pleas have been raised by the respondents to save the situation. Firstly, it has been urged that in the circumstances of the case by necessity the principles of natural justice have been excluded. The principle enunciated by the Supreme Court in the matter of cancellation of examinations on account of mass scale use of unfair means in conducting examinations by Education Authority or for selecting candidates for offering employment, the entire examinations were cancelled without affording an opportunity of hearing to the affected students or candidates. Particular reliance was placed on Union Territory of Chandigarh

v. Dilbagh Singh and others reported in AIR 1993 SC 796; Krishan Yadav and another v. State of Haryana and others reported in AIR 1994 SC 2166; Union of India and others v. Anand Kumar Pandey and others reported in AIR 1995 SC 388 and alternatively it was urged that at any rate the Board is prepared to give post decisional hearing now therefore illegality, if any, in the procedure adopted by the Board in making the impugned orders may be permitted to be cured by affording post decisional hearing. Reliance was placed on the Supreme Court decisions in Mohinder Singh Gill and Another v. The Chief Election Commissioner, New Delhi and Others reported in 1978(1) SCC 405; Mrs. Maneka Gandhi v. Union of India and another reported in 1978(1) SCC 248; Olga Tellis and others v. Bombay Municipal Corporation and others reported in 1985(3) SCC 545; Charan Lal Sahu v. Union of India reported in AIR 1990 SC 1480.

240. So far as the first contention of the respondents is concerned, it is sought to be supported on the principle which has been applied to cancellation of examinations or selections en masse in a case of mass scale illegality or irregularity having been noticed in the conduct of such examination without affording an opportunity of personal hearing to those who have undertaken examinations.

241. In Dilbagh Singh's case (1993 SC 796) the court categorically held that neither the members of Selection Board acquired any vested right or interest in sustaining selection list nor a candidate included in select list acquires an indefeasible right to appointment. He could be aggrieved for non appointment only when Administration does so no either arbitrarily or for no bonafide reason. In these circumstances, court held that neither the members of the Selection Committee nor candidate can claim right to be heard before select list is quashed for bonafide and valid reasons and not arbitrarily.

242. In the like manner decision in Krishan Yadav (1994 SC 2166) concerned with cancellation of select list on finding that process of selection was stinking, conceived in fraud and delivered in deceipt, and UOI vs. Anand Pandey (AIR 1995 SC 388) dealt with a case where candidates at Selection examination adopted mass scale unfair means

obviously cannot apply to the facts of the present case inasmuch as it is not a case where transactions which have taken place during the manipulated market conditions or culminated in manipulated market conditions are sought to be cancelled so as to leave a clean slate to start again. It is a case where the transactions in question in respect of which impugned orders of impounding considerations received on conclusion of outstanding transactions by the respective Stock Exchanges have not been made to score out the transactions that took place during manipulated conditions as a result of irregularities or illegalities.

243. Biswa Ranjan Sahoo and others v. Sushanta Kumar Dinda and others reported in JT 1996(6) SC 515 also was a case in which the principle of natural justice was held to be excluded where cancellation of entire selection was directed as a result of mass malpractice. The Court observed:

> "That in the case of selection of an individual his selection is not found correct in accordance with law, necessarily, a notice is required to be issued and opportunity be given. In a case like mass malpractice as noted by the Tribunal, as extracted hereinbefore, the question emerges: whether the notice was required to be issued to the persons affected and whether they needed to be heard? Nothing would become fruitful by issuance of notice. Fabrication would obviously either be not known or no one would come forward to bear the brunt. Under these circumstances, the Tribunal was right in not issuing notice to the persons who are said to have been selected and given selection and appointment."

The case is on par with Krishan Yadav and another v. State of Haryana and others reported in AIR 1994 SC 2166.

244. Another case relied on by the Counsel Hanuman Prasad & Ors. v. Union of India and Anr. reported in JT 1996(8) SC 510 was also a case where examinations/selections were cancelled after perusal of CBI report disclosing mass scale malpractices in writing examinations. As in Dilbaug Singh's case referred to above (AIR 1993 SC 796), the Court held

that selection committee recommendation do not give vested right or legitimate exception to candidates till they are appointed according to rules.

245. In fact transactions out of which sale proceeds have reached Stock Exchange are not tainted with any illegalities or irregularities. Transaction of squaring up the transactions by auction in Special Civil Application No. 2224 of 1996 has already taken place in accordance with the practice and bye laws of the Stock Exchange concerned, on invitation of concerned Stock Exchange before intervention by SEBI. Order does not deal with any transaction prior to auction. No illegality or irregularity has been attached to that act of Stock Exchange nor about conduct in offering at such auction and there has been no illegality in conduct of said auction. So also in Special Civil Application No. 5483 of 1996, the conclusion of outstanding transaction whether by auction or closing up of the transactions as per the Stock Exchange Regulations have taken place under the direction of the Board itself and the monies recovered under the said transactions are not tainted with any irregularities or illegalities and the same rightfully belong to persons whose transactions have been squared up, or who has offered his shares on auction sale. In fact those transactions have not been cancelled either but they have been allowed to be completed by recovery of the considerations as would have taken place on completion of transactions in ordinary market even without intervention of the Stock Exchange. In fact the order in one case results in splitting up of the consideration between the party to transaction and the statutory functionary by allowing payment of part consideration to the claimant and impounding the balance to be used at its direction and in the second case forfeiture of the amount of difference recovered by Stock Exchange which was required to be handed over to the purchasers whose transaction could not be carried out due to breach of contract by the other party, on the ground that the wind fall profits are not liable to be retained by the person person concerned irrespective of the fact whether he is party to manipulation or not. Such an order by no means can be construed to restore status quo leaving the slate clean for future operations. Therefore principles applied to set at naught the results en mass as a result of mass scale

irregularities, without fixing individual liability or responsibility on person concerned so as to characterise it as a penalty cannot be applicable to present circumstances.

246. As has been seen earlier in such an event orders can either in the nature of inflicting penalty on the person concerned or it amounts to levy of tax on profit, if the nature is not punitive. In either case, there is no room for holding that application of rules of natural justice have been excluded by necessary implication arising from the circumstances of the case.

247. It would be proper to quote from Charanlal's case (supra)(AIR 1990 SC 1480):

> "Audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application is that where a statute does not in terms exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order an merits then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good."

248. It offers answer to both the contentions of learned counsel for the respondents for exclusion of need of hearing and the offer of post decisional hearing to cure the defect. The principle that post decisional hearing in certain circumstances can cure the defect of not affording a pre-decisional hearing applied in the case of Mohinder Singh in 1978(1) SCC 405 and Maneka Gandhi's case in 1978(1) SCC 248 and in Olga Tellis case in 1985(3) SCC 545 arose in situations where pre-decisional hearing did not form part of the statutory requirement or where post decisional hearing was contemplated by the statute

itself.

249. A distinction has to be borne in mind that where prior hearing is required to be given as a part of rule of natural justice failure to give it would inevitably invalidate the exercise of power and it cannot be saved by post-decisional hearing. It is all the more applicable where the necessity of prior hearing is readable into the statute itself. It is only where the necessity of prior hearing cannot be read into the statute either on account of there being express provision for post decisional hearing or in the absence of necessary provision of pre-decisional hearing in the rule itself it cannot be held that purpose of exercise of the power may itself be defeated if pre decisional hearing is insisted upon that the post decisional hearing is required to be given and if that is done in such cases the exercise of power would not be vitiated.

250. It can be seen that in the precedents relied on by respondents in none of the cases there was any specific requirement of hearing in statute. Post decisional hearing was considered to be proper only as an exceptional measure in very emergent nature of action required to be taken, in the absence of statutory requirement.

251. In Olga Tellis case (1985) 3 SCC 545 the court was interpreting provision of Bombay Municipal Corporation Act which provided that Municipal Commissioner may without notice take steps for removal of encroachments. Thus it was a case in which pre decisional hearing was not necessary part of statutory requirement and statutes also enabled the authority to act even without notice. It is in these circumstances court held that it being enabling provision conferring power on the commissioner to cause an encroachment to be removed with or without notice. The court did not infer exclusion of rules of natural justice but stressed that discretion to exclude notice has to be exercised in a reasonable manner sparingly and in exceptional cases only.

252. In Maneka Gandhi's case (1978) 1 SCC 248 the court emphasised that rule of natural justice be applicable in the exercise of power of impounding a passport, even in the absence of specific provision. It was not held to be excluded by necessary implication notwithstanding emergent nature of

action required to be taken. It was also taken to be well settled that rules of natural justice are not inflexible and can be moulded being sufficiently flexible to permit modifications and variations to suit exigencies of myraid kinds of situation which may arise. In the circumstances of emergent nature of taking action in impounding passport to prevent a person from leaving country the court countenanced post decisional hearing a proper compliance of the rule of audi alteram partem. It said, "it would not be right to conclude that the rule is excluded merely because the power to impound a passport might be frustrated if prior notice and hearing were given to person concerned. The passport authority may impound the passport without giving any prior opportunity to the person concerned but as soon as the order impounding the passport is made an opportunity of hearing remedial in aim should be given.

253. It may be noticed that it was a case in which there was no specific statutory requirement of predecisional hearing and the court has countenanced post decisional hearing, not as a rule, but only in exceptional circumstances like the one where pre decisional hearing may frustrate the very purport of prompt action.

254. Likewise in Mohinder Singh Gill's case which related to decision making powers of Election Commissioner during elections, the court keeping in view the requirement of promptitude essential in an election, where elaborate and sophisticated methodology of a formalised hearing may be injurious to the object of expeditious proceeding, observed:

> "No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that Counsel should be allowed to appear nor it is compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone

> call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fair play of fair hearing. This is a matter preeminently for the Election Tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty."

255. This is ample indication of the fact that post decisional hearing as fulfilling requirement of natural justice is only an exception to general rule of predecisional hearing only in cases of very exceptional circumstances of need for prompt and emergent action failing which the very purpose of exercising power is likely to fail. That too in cases where the rule of natural justice are required to be followed as an inherent ingredient of fair play and not as a part of statutory requirement. All the cases relied on by the respondent are cases where the need to adhere to principles of natural justice was read into requirement to act with reasonableness even in the absence of any statutory requirement. Also the court did not permit the prehearing to be an easy casualty. However, none of the cases, lay down that even where statute requires predecisional hearing the authority can insist on post decisional hearing to cure initial defect. Even in the case of Tulsiram Patel (AIR 1985 SC 1416), the court read requirement of post decisional hearing where the natural justice was held to have been excluded in cases covered by proviso to Article 311(2).

256. Under Section 11B of the Act to which power to issue directions are traced empowers the Board to issue directions only on it being satisfied about the conditions referred to in the provision, as a result of making or causing to be made an enquiry. The very fact that before issuing directions an enquiry is required to be made and conclusions are to be reached it necessarily implies a pre decisional hearing; before the conclusion of enquiry. Section 11B by itself does not exclude application of rules of natural justice during hearing nor it speaks about giving post decisional hearing. Where the statute itself has provided penalties to be levied in the case of breaches of provisions of Act, Rules or Regulations under Chapter VA it has specifically provided under Section 15-I that for the purpose of adjudging any breaches pointed out in Section 15A to 15H, the adjudicating officer shall hold an enquiry in the prescribed manner and an adjudication will only be after giving the concerned person a reasonable opportunity of being heard for the purpose of imposing any penalty. In Regulations 1995 to which also the authority for making impugned order has been traced, while insisting of pre-decisional hearing under Regulation 8 when causing investigation under Regulation 7, by providing that Board is required to give notice before such investigation but also confer power to dispense with the requirement of issuing notice before investigation if the Board is satisfied that it is not in the interest of investors or in the public interest to issue notice, but when it comes to take decision and issue directions after completion of the investigation as a consequence thereof, such order cannot be made without giving a reasonable opportunity of hearing to concerned person. This is mandatory requirement of Regulation 11. It clearly obliges the Board that it can issue directions for the purposes of Regulation 12 only after considering the report referred to in Regulation 10 i.e. the report of the investigation officer and after giving a reasonable opportunity of hearing to person concerned, issue directions specified in Regulation 12. However, unlike Regulation 8 it does not provide for suspending with the requirement of pre-decisional hearing before issuing directions in any circumstances. As have been noticed in the observations of the Supreme Court referred to above in Charandas case (supra), the post decisional hearing is not a cure where pre decisional hearing

is a statutory requirement. In view of the aforesaid contention that the impugned orders are not vitiated for want of pre-decisional hearing and by offering post decisional hearing the defect is cured cannot be accepted in the facts and circumstances of the cases under consideration and it is held that in the present cases, post-decisional hearing cannot cure the invalidity attached to the impugned orders having been made for want of adherence to principles of natural justice.

257. It cannot be doubted that post decisional hearing itself is fraught with danger of inherent unfairness of procedure and can be resorted to only in exceptional circumstances. Ordinary rule of natural justice, whether under statute or on general principle is that an opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. Post decisional hearing is only a substitute of predecisional hearing in cases where requirement of hearing is not part of express provision of statute, in very emergent and exceptional circumstances.

258. In this connection reference may be made to K.I. Shepherd vs. Union of India (1987) 4 SCC 431 wherein services of employees were terminated without opportunity of hearing, when rules required such hearing to be precondition. A learned Single Judge of Kerala High Court proposed a post decisional hearing. R.N.Mishra, J. speaking for the court observed:

> "There is no justification to think of post decisional hearing. On the other hand normal rule should apply. ..... There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken there is tendency to uphold it and a representation may not really yield any fruitful purpose."

259. The view was reiterated by Supreme Court in H.L. Trehan v. Union of India (1989) 1 SCC 765, wherein the court after quoting from K.I. Shepherd's case said :

"The view that has been taken by this Court in the above observation is that once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular."

260. In this connection a contention was also raised that an appeal has been provided against the orders made by the Board before the Central Government and since appeal has been provided it must be construed as a provision of post decisional hearing and even if the original authority has committed the breach of principles of natural justice it should be deemed to have been cured by affording an opportunity of hearing before the appellate authority who is competent to set aside that order.

261. There is ample authority for the proposition that if natural justice is violated by the original authority the right of appeal is not a remedy which can correct the initial lack of fair trial by the original authority, as it would result in unfair trial followed by a fair trial as a substitute for fair trial followed by appeal. Dealing with the question of post decisional hearing by way of appeal Wade in his `Administrative Law' observed:

"In principle there ought to be an observance of natural justice equally at both stages, and if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

262. In Leary v. National Union of Vehicle Builders, (1971) Ch. 34, Megarry, J. said:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events. I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

263. The aforesaid view of Megarry, J. was followed by the Ontario High Court in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall, (1974) 42 DLR (3d) 323. The Supreme Court of New Zealand in Wislans v. Medical Practitioners Disciplinary Committee (1974) 1 NZLR 29 and also the Court of Appeal of New Zealand in Reid v. Rowland (1977) 2 NZLR 472 favoured the view. The aforesaid view of Megarry, J. found its approval with Supreme Court in Institute of Chartered Accountants of India v. L.K.Ratna reported in (1986) 4 SCC 537. The like plea has been made before me was rejected by the Apex Court after quoting with approval the aforesaid observations of Megarry, J. by adding another dimension.

"But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed.

> There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal....."Not all the King's horses and all the King's men" can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal.....And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceedings."

264. The impugned orders therefore suffer from the vice of procedural unfairness inasmuch as they have been made in breach of principles of natural justice.

265. It was also urged that the impugned orders also suffer from vice of being non-speaking orders. As the reasons for impounding the consideration received by the respective Stock Exchanges are not stated in the order and the reasons cannot now be supplied by way of affidavit.

266. This contention on behalf of the petitioners does not appear to be well founded. Both the orders primarily proceed on the ground that the prevalent high market price of the scrips in question was a result of certain manipulatory activities which has resulted in wind fall profits to persons operating in the market, besides the fact whether the persons concerned are themselves responsible for the prevalent market conditions or not, since it has resulted in wind fall profits, the parties who are entitled to receive such profits otherwise cannot be allowed to retain the same. This reason is very much apparent on the face of the impugned orders. If the matter rests with the correctness of the reasons alone, it would be for the appellate authority to examine its validity, wherever statutory appeals are provided against the order. But in such cases, the order cannot be attributed with the vice of absence of reason. The impugned action is impounding of the proceeds as a result of squaring up of the transactions, end of transaction period because of the reason that in the opinion of the Board prevailing prices are manipulated one should enure for the benefit of anyone. Whether

there is authority for taking such decision or not and whether such orders are otherwise lawful and sustainable are clearly different questions than to say that the impugned action is founded on orders which does not disclose the reasons for its making. However, learned counsel for the petition are right in their submission that order must stand or fall on what has been stated therein and no additional reasons or facts can be supplied to sustain the order which do not speak from the order itself.

WHETHER RELIEF BE DENIED ON PRINCIPLE OF UNJUST ENRICHMENT

267. Lastly it was urged that since the amount which has been impounded by the Board as a result of manipulated market conditions, it amounts to unjust enrichment if it goes in the hands of persons who are party to the transactions and therefore no relief be granted to the petitioners under Article 226.

268. Policy underlining doctrine of unjust enrichment is that one person should not be permitted to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated where it is just and equitable that such restitution be made and where such action involves no violation or frustration of law or opposition to public policy. Unjust enrichment of a person occurs when he has and retained money or benefits which in justice and equity belong to another. Reference may be made to Black's Law Dictionary.

269. The principle of unjust enrichment requires first that the person against whom this principle is to be applied has been enriched by receipt of a benefit. Secondly that such enrichment is at the expense of another person by whom refund has been claimed, and thirdly, that the retention of the enrichment by the person so enriched is unjust. Reference in this connection may be made to Mahabir Kishore and others v. State of Madhya Pradesh reported in AIR 1990 SC 313. In commercial transaction therefore the principle of unjust

enrichment can be applied for refund of the amount to someone at whose cost the alleged unjust enrichment has taken place or not permitting a person to retain the same, in order to bring a situation that it can be made available for return to rightful claimant. But certainly this cannot be applied to money retained by a person in trust for the rightful claimant by not permitting its return to the claimant and exacting of it by the State for its public purposes unless the law by competent legislature has been validly enacted or framed which may properly be termed as a positive law to reach it within constitutional limits. The principle of unjust enrichment cannot be invoked for the purpose of conferring upon the Board an authority to exact such enrichments by executive authority.

270. The principle of unjust enrichment has been applied where the money has already been recovered by the State authority under the existing provisions of law which may ultimately be held to be ultravires and such money in fact in given circumstances may not belong to a person who has actually paid but belonged to third persons who are entitled thereto or at whose cost he has become unjustly rich. It is in such cases or where tax is assumed to have been passed on to consumers or to the persons from whom actually the tax payer is assumed to have collected so that by retaining such amount there is no deprivation of the property of the person concerned by the State which is not authorised by law, inasmuch as an amount which is held not to be belonging to the claimant and who is claiming refund on the ground that he may be refunding it to the actual claimants really do not result in depriving that person of anything which can be said to be a property of the claimant.

271. In State of Madhya Pradesh v. Vyankatlal and others reported in AIR 1985 SC 901, the Court after referring to its earlier decisions in the cases - The Sales Tax Officer, Banaras and others v. Kanhaiya Lal Makund Lal Saraf reported in AIR 1959 SC 135; The State of Bombay and another v. The United Motors (India) Ltd and others reported in AIR 1953 SC 252; Orient Paper Mills Ltd., v. State of Orissa and others reported in AIR 1961 SC 1438; M/s. Shiv Shanker Dal Mills etc. etc. v. State of Haryana and others etc. reported in AIR 1980 SC 1037; M/s. Amar Nath Om Parkash and others v. State of Punjab and others reported in AIR 1985 SC

218 and The Newabganj Sugar Mills Co. Ltd. and others v. The Union of India reported in AIR 1976 SC 1152, said:

> "The principles laid down in the aforesaid cases were based on the specific provisions in those Acts but the same principles can safely be applied to the facts of the present case inasmuch as in the present case also the respondents had not to pay the amount from their coffers." The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund."

272. Like wise in U.P.State Electricity Board, Lucknow v. City Board, Mussoorie and others reported in AIR 1985 SC 883, the court denied the relief under Article 26 on the ground -

> "The learned counsel for the City Board was not able to state that the City Board had not recouped itself by collecting the charges from the consumers. In this situation, we have to presume that the City Board had not suffered any loss by the levy of seven and half percent by way of additional charges. We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution."

273. The same principle was reiterated in the context of commercial transactions in Renusagar Power Co. Ltd. v. General Electric Co. reported in 1994 Supp (1) SCC 644:

> "The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution."

274. The court refused to consider the case of the appellant for recovering the sum from the other side which was founded on the ground that if applicants are not allowed the sum it would result in retaining unjust enrichment to the respondents. This also supports that apart from the plea of restitution the recovery of damages even by a party to transaction is not permitted to be founded on the basis of unjust enrichment, and the retention by the statutory functionary in the public interest is countenanced only where the sum in question does not belong to the person from whom it has been recovered.

275. Circumstances of the present case reveals obvious lack of circumstances in which doctrine of unjust enrichment does not arise in this case at all. As has been noticed that the impugned orders in either cases does not impinge upon any act referable to any party in respect of the transactions in question as a result of which the alleged windfall profits have arisen to parties concerned. In Special Civil Application No.2224 of 1996 at the close of period offer at auction was invited by the Stock Exchange. On the date when offer was invited, the market price prevailing during past six months was very well known to all concerned. The scrips were offered in pursuance of the invitation by the Stock Exchange at its own terms, and the Stock Exchange had recovered the money from the purchasers and short sellers respectively as per the prices known on that date. It is not the case that such invitation by Stock Exchange was in any way part of manipulation. It was open to Stock Exchange not to intervene. Therefore, so far as the transaction in question was concerned, no manipulation on the part of any of the parties concerned is even alleged, nor profit arising out of such transaction can be said to be an unlawful enrichment at somebody else's cost. Moreover, it was open, assuming that it had power to do so, for the Board, to have cancelled the transaction altogether and obliterated the unlawful profits, and prevented the alleged windfall profits to have arisen at all. Instead by its own action it has permitted the windfall profits to come into existence which in its opinion should not at all have arisen and then proceeded to exact it for its own purposes and deprived the person who were otherwise entitled to receive it. This does not warrant the invocation of principle of under

enrichment in the present case. Likewise, in Special Civil Application No.5483 of 1996 the auction purchase or the close out of the transaction on the close of the period were carried out at the direction of the Board itself. Therefore in the squaring up of the transaction either by calling in offers at auction or by closing out the transactions by recovering the difference of price between the transaction price and the highest price prevailing during the last six months is no part of resorting to any manipulation, on the part of anyone. In this latter case, even there is no suggestion that the petitioner was at all concerned with the manipulation of the market price even otherwise. How in the circumstances, a person securing a profit unaware of any manipulation in the market can be held to be holding claim to an undue enrichment. No power has been either conferred under the statute on the Board to limit the margin of profits which a scrip holder can earn by his own estimation of the market conditions or he can be hauled up for securing returns of his legitimate profits for default of others on the principle of unjust enrichment when such transaction itself is outcome of the directives of the statutory body itself. If the plea of the respondents about it being illegal or void transaction is to be considered it would mean that any transaction which had come into existence as a result of violation of regulations of 1995 must be deemed to be void bearing no fruits, in that event, so far as the completion of transaction itself would not take place. In such circumstances question of receiving any price/difference by Stock Exchange will not at all arise. Nor Stock Exchange receives such amount for itself. Nor it is anybody's case that amount impounded rightfully belong to short sellers. In the case of auction sale transaction of sell and purchase has actually taken place in which scrips of offerer has been sold by Stock Exchange at a particular price and recovered the same from those who were responsible to make the payment. To such amount the offerer could only be lawfully entitled to and none of the other parties involved viz parties to outstanding transaction or Stock Exchange could lay any claim or for that matter the Board, could say that it was a profit belonging to someone else at whose expense the offerer of shares has been benefited. Since the impugned order nowhere impinges upon the directions as a result of which the sale proceeds or the different proceeds have reached the Stock Exchange

the person concerned are entitled to get that consideration as a result of a valid transaction. In my opinion, without attacking the validity the said transaction on any ground whatsoever the proceeds or profits arising out of such transactions can not be considered to be an undue or unlawful much less unjust enrichment at the cost of someone or adverse to the interest for whose benefit such profit must have arisen. The plea simply does not arise for consideration. Therefore the plea founded on principle of unlawful and unjust enrichment cannot be a relevant consideration for rejecting the petitioner's claim.

276. The transactions out of which the proceeds have arisen and reached the hands of Stock Exchange were as a result of lawful culmination of outstanding transaction of purchases for want of availability of delivery with shortsellers, through the intervention of Stock Exchange by adopting well established practice, recognised by regulations of Stock Exchange itself, of squaring up transaction either by auction call or by closing up. On such lawful conclusion of squaring up process, the proceeds recovered by Stock Exchange lawfully belongs to deliverer of scrips/purchaser of shares as the case may be. The amount held by Stock Exchange was only for the benefit of those in respect of whose transactions it has acted. The buyer of the scrips or deliverer of scrips at auction sale, does not receive or hold consideration proceeds for benefit of anyone else. The consideration also did not reach SEBI. If the transaction were to be cancelled, no proceeds will at all arise to give occasion for applying doctrine of unjust enrichment. If transactions are allowed to be completed in regular manner then only person lawfully entitled to receipts made by Stock Exchange is the person who has offered the shares at the auction of Stock Exchange or of the buyer in whose transaction difference in price has been recovered from short sellers only for the benefit of buyer. In either case for reaching such proceeds to brand the same to be ill gotten is nothing but an order of exaction of money which have become part of actionable claim of the person who are entitled to it under law but for the impugned orders. Impugned orders do not propose to or purport to act for the benefit of those to whom the gains rightfully belong, and it could not be because, it rightfully belonged to receiving party to contract. The

impugned orders directly purport to deprive the petitioners or persons like petitioners of the property which belongs to them under law.

277. Moreover this is not a case where a person is claiming refund or return of money which has come in possession of State the paramount repository of public interest and it does not want to return for individual benefit, which lawfully does not belong to him. It may be noticed that denying relief on principle of unlawful or unjust enrichment has been enunciated with respect to cases where a person has either collected taxes from persons which were not leviable or prices in excess of regulatory prices fixed under statutory orders, which lawfully otherwise did not belong to him, or was an illegal exaction in the hands of person himself. Where such amounts had already reached public coffers and a claim to such amount was laid on the ground that levy having been held to be unauthorised, the State has no power to retain it and the same may be returned to the person who has paid it into State exchequer, irrespective of the fact whether he himself is entitled to it or not. A distinct line of authorities have come in existence to deal with two situations. One where such proceeds are in the hands of recipient, there in the absence of specific provision of law, the claim of authority to recover the same has been repelled. On enacting such law, same has been upheld only in case it is falling in category of ancillary or incidental to main purpose, but not as a substitute for main purpose itself. On the other hand where such receipts have been handed over to exchequer whether by mistake or under protests, the refund in such cases has been refused on the ground that it belongs to beneficiaries and not to claimant, and allowing the claimant to retain such amount would result in his unjust enrichment, because the same does not belong to him either. A clear illustration is provided under Excise Act where specific provision has been made for recovery of sum collected by a manufacturer from his customers as excise duty to be handed over to exchequer for the benefit of consumer, and to deny refund of such amount to a manufacturer, if paid, unless he proves that he has not recovered the amount from his customers. The like provision have also been made in various State Sales Tax Laws. These provisions are pointer to fact that unless the claim to money can be said to be not belonging to claimant, the principle of unjust enrichment cannot

apply, nor exaction of alleged windfall profits can be made, as distinguished from retention, without authority of law. Present cases are neither of the nature where the proceeds belong to somebody other than the petitioner, nor is a case of retention, but is a clear case of exaction. Hence relief cannot be denied on the anvil of doctrine of unjust enrichment.

CONCLUSION

278. As a result of the aforesaid discussion it is held that the Board has no authority of law under the existing statute to impound or forfeit the monies received by Stock Exchange as concluded transactions for squaring up the outstanding transactions under its procedure and to use for any other purposes, and that the orders also suffer from breach of principles of natural justice which results in making them void ab initio. Consequentially, the orders cannot be sustained. Relief in the present circumstances cannot be denied on principles of unjust enrichment.

279. In view of the aforesaid conclusions, merits of other contentions about validity of impugned orders need not be examined.

280. As a result, the petitions are allowed. The impugned order dated 4.7.96 in Special Civil Application No. 2224 of 1996 and orders dated 25.1.1996 in Special Civil Application No.5483 of 1996 made by the Board as affirmed by the Central Government by its order 22.5.1996 are quashed, to the extent they direct impounding of the monies recovered by the respective Stock Exchanges on the closing transactions.

281. Rule made absolute accordingly in each case. No costs.